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PROPOSITION 209†

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INTRODUCTION

I have a proposition for you. It's called Proposition 209. All you have to do is stop discriminating in favor of women and racial minorities, and your perpetual problems of race and gender discrimination will finally disappear. If this Proposition sounds too good to be true . . . well, you know how the saying goes. In law, as in life, the seductiveness of a proposition owes as much to its disregard of established norms as to its underlying content. Eliminate the affront to social convention, and a proposition promises about as much excitement as a routine liaison with one's spouse. But add the allure of forbidden temptation, and a proposition acquires a naughty fascination that can make it seem irresistibly compelling. Propositions are also socially precocious. They intimate a liberated enlightenment that trumps the social inhibitions to which most of us remain unwittingly captive. To be sure, indignant disapproval is the appropriate response to an indecent proposal in polite society. But beneath the surface of such indignation, can there truly be anyone who is not secretly drawn to the thrill of a proposition?

True to form, California's Proposition 209 is thrilling, seductive, and replete with naughty fascination. The recently adopted ballot initiative, which has amended the California Constitution to prohibit race- and gender-based affirmative action by agencies of the state, is thrilling in its defiance of current convention. Its populist rejection

of the affirmative action concept is staggering in scope, and irreverent in demeanor. It seems to condemn all affirmative action programs—regardless of their remedial justification or prospective promise—in a brazen rebuke of the social policymakers who spent decades putting those programs in place. Moreover, Proposition 209 is seductive in its simplicity. It suggests that centuries of intractable race and gender injustice can be neutralized through the unadorned expedient of prospective neutrality. Although such a suggestion dismisses conventional wisdom on the complex nature of race and gender relations, Proposition 209 lays precocious claim to one of those liberated enlightenments that the uninitiated have yet to recognize as appropriate. Proposition 209 is also replete with the naughty fascination of forbidden temptation, because of the bewitching possibility that it might be merely a ruse. Formally denominated the "California Civil Rights Initiative," Proposition 209 pledges to advance the cause of race and gender equality. But like the separate-but-equal and gender protective regimes that preceded it, Proposition 209 may be just another discriminatory attempt to appropriate resources by those accustomed to having them, at the expense of those accustomed to having them taken away.

As a nation whose formulation of social policy is constitutionally constrained, we reflexively turn to the courts for constitutional resolution of our controversial social policy disputes. But it turns out that the Constitution has surprisingly little to say about the validity of Proposition 209. This fact is starkly demonstrated by the divergent judicial receptions that Proposition 209 has received to date. Shortly after the adoption of Proposition 209, a federal district court issued a temporary restraining order enjoining its implementation, finding a "strong probability" that Proposition 209 would ultimately be held to violate the Equal Protection Clause of the Constitution.[1] A few months later a three-judge court of appeals panel reversed the district court, stating that "[a]s a matter of 'conventional' equal protection

1. Coalition for Econ. Equity v. Wilson, No. C 96-4024 TEH, 1996 WL 691962, at *3 (N.D. Cal. Nov. 27, 1996) (issuing temporary restraining order). In its subsequent opinion granting a preliminary injunction, the district court replaced its previous finding of a "strong probability" of success with a finding that the plaintiffs had demonstrated a "probability of success" on their claim of unconstitutionality. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1491, 1510, 1519, 1520 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

analysis, there is simply no doubt that Proposition 209 is constitutional."[2] The discrepancy between these two adjudications is telling.

The divergent doctrinal arguments offered by the district court and the court of appeals seem plausible within the confines of the opinions that advance them, but like two ships passing in the night, neither opinion engages the arguments made by the other. The district court determined that Proposition 209 was likely to be unconstitutional because it treated race and gender preferences differently than it treated other preferences, such as preferences for veterans, athletes or alumni children. Accordingly, the district court held that Proposition 209 constituted a race and gender classification that was prohibited by the Equal Protection Clause of the Constitution.[3] More specifically, the district court found that Proposition 209 restructured the political process in a way that made it more difficult for proponents of race and gender preferences to secure the preferences that they desired (they had to amend the state constitution) than it was for proponents of other types of preferences to secure the preferences that they desired (they needed only to secure the adoption of ordinary legislation or administrative regulations).[4] The court of appeals, on the other hand, found that Proposition 209 could not violate the Constitution under "conventional" equal protection analysis because it required the same race and gender neutrality that the Equal Protection Clause itself required.[5] Moreover, as a matter of "political structure" analysis, the court of appeals held that Proposition 209 did not impermissibly restructure the political process. The court found that any political burdens suffered by women and minorities ultimately resulted from the neutrality commands of the Equal Protection Clause, and not solely from the Proposition 209 prohibition on race and gender preferences.[6]

Despite each opinion's facial plausibility, neither responds to the baseline assumptions made by the other. The court of appeals opinion ignores the fact that Proposition 209 applies meaningfully only to affirmative action that is *permitted* by the Constitution (unconstitutional affirmative action would be invalid even in the absence of

2. Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir. 1997). The Supreme Court ultimately denied certiorari, thereby allowing the court of appeals decision to stand. *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 397 (1997).

3. *See Coalition for Econ. Equity*, 946 F. Supp. at 1504-06, 1508-10.

4. *See id*. at 1506-10.

5. *See Coalition for Econ. Equity*, 122 F.3d at 701-02.

6. *See id*. at 702-09.

Proposition 209). As a result, Proposition 209 is itself an impermissible race and gender classification. It is a race and gender classification because it treats race and gender preferences differently than it treats other preferences. And it is impermissible under the heightened scrutiny that is applied to race and gender classifications, because its justification for this differential treatment is to neutralize affirmative action preferences that are themselves constitutionally valid. These constitutionally valid affirmative action preferences are therefore doctrinally indistinguishable from other non-prohibited preferences, but Proposition 209 treats them in ways that are fatally different. Moreover, Proposition 209 treats race and gender preferences differently than other preferences precisely *because* they benefit race and gender minorities rather than groups like veterans, athletes or alumni children: this makes Proposition 209 discriminatory in the most traditional sense. The court of appeals response to the district court argument, therefore, is simply non-responsive.

But there is a similar problem with the district court argument. The district court asserts that Proposition 209 is itself a racial preference that restructures the political process in a discriminatory manner, but as the court of appeals points out, Proposition 209 treats all races and genders in precisely the same way. It is true that the *topics* addressed by Proposition 209 are constitutionally suspect race and gender groups, but Proposition 209 is utterly neutral in the way that it treats those constitutionally suspect groups: it bans all preferences regardless of whom they benefit or burden. As a result of this neutrality, Proposition 209 is not subject to heightened constitutional scrutiny, because it is not a race or gender classification at all and it cannot violate an Equal Protection Clause that does nothing more than demand equal treatment within race and gender groups. Although *Loving v. Virginia*[7] arguably holds that a legislative classification can become a race or gender classification merely by using the topics of race or gender as the basis for classification,[8] this aspect of *Loving* may simply be wrong. The district court response to the court of appeals argument, therefore, is simply non-responsive.

Each opinion views Proposition 209 from a different perspective, but neither perspective can realistically claim to be more constitutionally correct than the other. Each perspective merely reflects a

7. 388 U.S. 1 (1967).

8. *See id.* at 8-9 (holding that a statutory scheme to prevent interracial marriages on the basis of race violates the Equal Protection and Due Process Clauses).

different set of baseline assumptions and normative preferences concerning the desirability of affirmative action as a policy. The liberal black district court judge likes affirmative action as a means of combating the lingering effects of race and gender discrimination, but the conservative white court of appeals judges dislike affirmative action because it interferes with their desire for prospective race and gender neutrality. There is, however, nothing in the Constitution that is capable of resolving this social policy dispute without simply elevating one policy preference above the other for reasons of subjective normative appeal. The meaning of the Equal Protection Clause is simply indeterminate with respect to the constitutionality of Proposition 209.

This doctrinal indeterminacy is a signal that the judiciary does not have any productive role to play in the resolution of the current affirmative action debate. In a democracy, resolution of that debate is properly left to the politically accountable branches of government rather than to the politically unaccountable Supreme Court. In essence, the affirmative action debate constitutes a nonjusticiable political question in the classic sense in which that concept was first invoked by Chief Justice Marshall in *Marbury v. Madison*.[9] Moreover, the Court's record on race- and gender-based policymaking counsels against its entry into the Proposition 209 debate. When the Supreme Court has intervened in the political process of race- or gender-based policy formulation, it has often ended up sacrificing minority interests for majoritarian gain, as it did in *Dred Scott v. Sandford*,[10] *Plessy v. Ferguson*[11] and even *Brown v. Board of Education*.[12] Ironically, the

9. 5 U.S. (1 Cranch) 137, 166 (1803) (observing that the exercise of executive discretion regarding political issues can never be examined by the courts).

10. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451-52 (1856) (invalidating the Missouri Compromise because the Constitution did not grant Congress the power to deny a citizen (slaveholder) his property (slaves) by prohibiting slavery in certain U.S. Territories, and thereby returning Dred Scott and his family to slave status).

11. 163 U.S. 537, 550-51 (1896) (constitutionalizing the "separate but equal" doctrine and arguably mandating that public accommodations be "equal" for all races, but still allowing separate accommodations based solely upon race).

12. 347 U.S. 483, 495 (1954) [hereinafter *Brown I*]. Although *Brown* seemed to prohibit governmental use of racial classifications in general, *see id.* at 494-95 (overruling the *Plessy* "separate but equal" doctrine); *cf.* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 174 (1962) ("[A] judgment legitimating [antimiscegenation] statutes would have been unthinkable, given the principle of the *School Segregation Cases* . . . ."), and promised to desegregate public schools, *see* Brown v. Board. of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*] (requiring desegregation of public schools "with all deliberate speed"), it did neither. Northern schools are still badly segregated, and racial classifications are common in governmental actions ranging from drug profiles to

equality concept on which *Brown* rests has now been rendered most useful as a tool to invalidate affirmative action programs.[13]

The Supreme Court declined to enter the doctrinal debate between the lower courts concerning the constitutionality of Proposition 209, electing to deny certiorari rather than address the merits of the pending facial challenge to Proposition 209.[14] However, the Court will almost certainly be called on again to resolve the constitutionality of Proposition 209 when Proposition 209 is invoked to invalidate particular California affirmative action programs. The Supreme Court will be in a difficult position as it considers the proper response to Proposition 209. On a clean slate the Court could simply defer to the political process and decline to invalidate Proposition 209. But the Court is not writing on a clean slate. It has already intervened in the political policymaking process in cases like *Adarand Constructors, Inc. v. Pena*[15] and the recent string of voting rights cases[16] to invalidate racial affirmative action programs. For reasons that are developed in Part III of this Article, the Court cannot legitimately uphold political prohibitions on affirmative action after having selectively intervened to invalidate political endorsements of affirmative action. Accordingly, if the Supreme Court is to behave in a manner that does not itself violate the Equal Protection Clause, it must either overrule cases like *Adarand* and the voting rights cases in

adoption standards. *See infra* notes 395-412 and accompanying text (discussing failure of *Brown* to realize promised objectives).

13. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941, 1951 (1996) (plurality opinion) (invalidating majority-minority voting districts adopted by state legislature); Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996) (same); Miller v. Johnson, 515 U.S. 900, 921 (1995) (same); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238-39 (1995) (apparently invalidating congressionally-adopted minority construction preference under strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989) (invalidating minority construction set-aside adopted by city council); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion) (invalidating layoff preference for minority teachers adopted by board of education as part of consent decree); *cf.* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194-95 (1997) (upholding, under rational-basis scrutiny, constitutionality of voter redistricting plan that used race as factor, where race did not predominate over traditional districting principles and plan was part of consent decree that omitted disputed majority-minority district); Abrams v. Johnson, 117 S. Ct. 1925, 1941 (1997) (upholding court-adopted districting plan that substituted one majority-minority district for three majority-minority districts contained in plan adopted by state legislature after Supreme Court invalidation and remand in *Miller*).

14. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

15. *See Adarand*, 515 U.S. at 238-39 (subjecting minority preference in award of construction contracts to strict scrutiny and likely invalidation).

16. *See supra* note 13 and accompanying text.

order to let the political process resolve the affirmative action debate, or invalidate Proposition 209 under the same standards that the Court has recently used to invalidate affirmative action programs.

Judicial withdrawal from the affirmative action debate is the preferable alternative, but such a withdrawal would entail the relinquishment of more social policymaking power than the Supreme Court is likely to give up. Accordingly, it is most realistic to hope that the Court will invalidate Proposition 209 so that proponents and opponents of affirmative action can compete on more equal terms in whatever sphere the Court leaves open for political policymaking. If the Court chooses this option, it should rely on a form of doctrinal analysis that is viscerally more satisfying than the political structure analysis emphasized by the lower courts. Because Proposition 209 redistributes societal resources on the basis of race and gender just as other affirmative action programs do, the Court should subject Proposition 209 to heightened scrutiny just as it subjects other affirmative action programs to heightened scrutiny. If the Court is not willing to treat Proposition 209 as analogous to other affirmative action measures, the Court should still subject Proposition 209 to heightened scrutiny under a *Washington v. Davis*[17] intentional discrimination analysis.[18] An intentional discrimination analysis also reveals that Proposition 209 is a race and gender classification that should trigger heightened judicial scrutiny. Moreover, the Supreme Court's stated aversion to discriminatory animus, recently reaffirmed in *Romer v. Evans*,[19] indicates that Proposition 209 cannot survive heightened, or even minimal, constitutional scrutiny under the Equal Protection Clause.[20] The Supreme Court, therefore, possesses the doctrinal means to invalidate Proposition 209 in a convincing manner. What remains to be seen is whether the Court possesses the commitment to race and gender equality that is necessary to generate this result.

Part I of this Article discusses what is at stake in the debate surrounding Proposition 209. Part I.A discusses the apparent purpose of Proposition 209. Part I.B discusses subtle ambiguities in the meaning

17. 426 U.S. 229 (1976).

18. *See id.* at 238-48 (requiring proof of a discriminatory purpose to trigger heightened scrutiny under the Equal Protection Clause).

19. 116 S. Ct. 1620 (1996).

20. *See id.* at 1627 (commenting that because Colorado's anti-gay ballot measure appears to be rooted in anti-gay animus, the measure "lacks a rational relationship to legitimate state interests").

of Proposition 209. Part I.C discusses how these ambiguities emanate from contestable beliefs about the abstract concepts of neutrality and merit, and suggests that the continued viability of these concepts is what is really at stake in the contemporary affirmative action debate.

Part II analyzes the legal arguments that the lower courts made for and against the constitutionality of Proposition 209, in an effort to demonstrate that the governing equal protection standards are doctrinally indeterminate. Part II.A analyzes the court of appeals opinion upholding the constitutionality of Proposition 209, and highlights the doctrinal difficulties inherent in the court of appeals view that Proposition 209 is race- and gender-neutral. Part II.B analyzes the district court opinion enjoining implementation of Proposition 209 on equal protection grounds, and highlights the doctrinal difficulties inherent in the district court view that Proposition 209 is a discriminatory race and gender classification.

Part III argues that the Supreme Court should either withdraw from the social policy debate about affirmative action, or maintain consistency by invalidating Proposition 209 as it has recently chosen to invalidate other affirmative action programs. Part III.A suggests that doctrinal indeterminacy precludes the Supreme Court from playing any productive role in the resolution of the on-going political debate about affirmative action, but presumes that the Court will be unwilling to treat the policy desirability of affirmative action as a nonjusticiable political question. Part III.B then argues that the Court should subject Proposition 209 to heightened scrutiny as either an affirmative action program for white males, or an act of intentional discrimination under *Washington v. Davis*, and should then invalidate Proposition 209 under the discriminatory animus analysis of *Romer*. This Article concludes that whatever action the Supreme Court chooses to take, it would be unrealistic to expect the Court to act as if it were not itself an integral part of our political culture.

I. STAKES OF THE DEBATE

Proposition 209 was adopted by the voters of California as a ballot initiative in the November 5, 1996 general election, by a margin of 54 to 46 percent of the nearly 9 million votes cast.[21] Formally

21. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696, 697 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

entitled the "California Civil Rights Initiative,"[22] Proposition 209 amends the California Constitution so that it generally prohibits race- and gender-based affirmative action by California state agencies.[23] Proposition 209 has attracted national attention because of the impact that its ultimate constitutional fate may have on similar proposals to eliminate affirmative action presently being considered by Congress and other states.[24]

On November 6, 1996—the day after Proposition 209 was adopted—a coalition representing the interests of women and racial minorities who opposed Proposition 209 filed suit in the United States District Court for the Northern District of California, mounting a facial challenge to Proposition 209 on equal protection and federal pre-

22. *See id.* at 696.

23. *See id.* (quoting California Ballot Pamphlet prepared by non-partisan California Legislative Analyst's Office to describe Proposition 209 to California voters); Coalition for Econ. Equity v. Wilson, 946 F. Supp 1480, 1493 (N.D. Cal. 1996) (same), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

24. *See, e.g.*, William Claiborne, *Affirmative Action Ban Is Upheld; California Proposition Constitutionally Valid, U.S. Appeals Panel Says*, WASH. POST, Apr. 9, 1997, at A1 (commenting on effect that Proposition 209 might have on anti-affirmative action proposals being considered by Congress and by other states); Ellis Cose, *After Affirmative Action: Proposition 209 May Become Law, but Californians Are in No Rush to End All Racial Preferences*, NEWSWEEK, Nov. 11, 1996, at 43 (same); Maura Dolan, *U.S. Panel Upholds Prop. 209 Affirmative Action: Three 9th Circuit Justices Rule that Measure to Eliminate Preferences for Women and Minorities in College Admissions and Government Employment is Constitutional. Opponents Will Appeal, but Some Analysts Believe They Face an Uphill Battle*, L.A. TIMES, Apr. 9, 1997, at A1 (same); *Not over Till It's over*, ECONOMIST NEWSPAPER, Nov. 16, 1996, at 27 (same); Tim Golden, *Federal Appeals Court Upholds California's Ban on Preferences*, N.Y. TIMES, Apr. 9, 1997, at A4 (same); Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, § 6 (Magazine), at 36 (same).

Proposition 209 has also begun to attract scholarly attention. *See, e.g.*, Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996); Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115 (1996); Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999 (1996); Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996) [hereinafter Gotanda, *Color-Blind Vision*]; Neil Gotanda et al., *Legal Implications of Proposition 209—The California Civil Rights Initiative*, 24 W. ST. U. L. REV. 1 (1996) [hereinafter Gotanda et al., *Legal Implications*]; Pamela A. Lewis, *Debunking the Myth That Subdivision (c) of the California Civil Rights Initiative Lessens the Standard of Judicial Review of Sex Classifications in California*, 23 HASTINGS CONST. L.Q. 1153 (1996); Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073 (1996); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996); Catherine A. Rogers & David L. Faigman, *"And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057 (1996); Winkfield F. Twyman, Jr., *A Critique of the California Civil Rights Initiative*, 14 NAT'L BLACK L.J. 181 (1997); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997).

emption grounds.[25] District Judge Thelton Henderson, a liberal black judge appointed by President Carter,[26] certified a plaintiff class and issued a temporary restraining order on November 27, 1996.[27] He certified a defendant class on December 16, 1996,[28] and issued a preliminary injunction on December 23, 1996 enjoining the implementation of Proposition 209 pending a trial on the merits.[29] In issuing the preliminary injunction, Judge Henderson determined that the plaintiffs had demonstrated a likelihood of success on the merits of both their equal protection claim and their Title VII federal preemption claim.[30]

On April 8, 1997, the United States Court of Appeals for the Ninth Circuit unanimously vacated the district court's preliminary injunction, holding that Proposition 209 was neither facially unconstitutional, nor preempted by Title VII.[31] The judges on the court of appeals panel were Diarmuid F. O'Scannlain, Edward Leavy, and Andrew J. Kleinfeld[32]—three conservative white judges who had been appointed by Presidents Reagan and Bush.[33] Judge O'Scannlain wrote the Ninth Circuit opinion.[34] On June 4, 1997, the plaintiffs filed

25. *See Coalition for Econ. Equity*, 122 F.3d at 697.

26. *See* Claiborne, *supra* note 24, at A1 (characterizing Judge Henderson as a liberal judge); Dolan, *supra* note 24, at A1 (same); Golden, *supra* note 24, at A1 (same).

27. *See* Coalition for Econ. Equity v. Wilson, No. C 96-4024 TEH, 1996 WL 691962, at *1 n.1, *3-*4 (N.D. Cal. Nov. 27, 1996) (noting certification of plaintiff class and granting temporary restraining order). On December 6, 1996, the district court extended its temporary restraining order to officials of the University of California, who wished to implement Proposition 209 immediately with respect to certain admissions and financial aid decisions. *See* Coalition for Econ. Equity v. Wilson, No. C 96-4024 TEH, 1996 WL 788375, at *2-*3 (N.D. Cal. Dec. 6, 1996).

28. *See* Coalition for Econ. Equity v. Wilson, No. C 96-4024 TEH, 1996 WL 788376, at *2-*3 (N.D. Cal. Dec. 16, 1996) (certifying defendant class comprised of state and local government officials bound by Proposition 209, and appointing California Governor Pete Wilson and California Attorney General Daniel Lungren to be class representatives). The defendant class was certified even though some of the government officials bound by Proposition 209 agreed with the plaintiffs that Proposition 209 was unconstitutional. *See id.* at *2.

29. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1520-21 (N.D. Cal. 1996) (granting preliminary injunction), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

30. *See id.* at 1491, 1510, 1519, 1520.

31. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 710-11 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

32. *See id.* at 696.

33. *See* Claiborne, *supra* note 24, at A1 (noting conservative background of court of appeals judges in *Coalition for Economic Equity*); Dolan, *supra* note 24, at A1 (same); Golden, *supra* note 24, at A1 (same).

34. *See Coalition for Econ. Equity*, 122 F.3d at 696.

a petition with the full Ninth Circuit requesting a rehearing en banc, which the Ninth Circuit denied on August 21, 1997.[35] On August 29, 1997, the plaintiffs filed a petition for certiorari,[36] which the Supreme Court denied on November 4, 1997.[37]

The national significance of the constitutional issues raised by Proposition 209, combined with the striking divergence in the legal analyses offered by the lower courts concerning the dictates of existing Supreme Court precedent, would normally seem sufficient to warrant a grant of certiorari by the Supreme Court.[38] This is particularly true in a case such as *Coalition for Economic Equity*, which presents the legal issues relevant to the facial validity of Proposition 209 in a clear manner that is unencumbered by justiciability difficulties. Moreover, the reasoning of the court of appeals decision that the Supreme Court allowed to take effect was far from trouble-free,[39] and the result reached by the court of appeals seems equally trouble-

35. *See* Coalition for Econ. Equity v. Wilson, Nos. 97-15030, 97-15031, 1997 WL 528335, at *1 (9th Cir. Aug. 21, 1997). On August 26, 1997, the Ninth Circuit panel denied a motion to stay the effectiveness of its decision pending the Supreme Court's decision on whether to grant certiorari, thereby permitting Proposition 209 to take effect on August 28, 1997. *See Coalition for Econ. Equity*, 122 F.3d at 719-20. On September 4, 1997, the Supreme Court denied a motion for an emergency stay, thereby permitting Proposition 209 to remain in effect while the Supreme Court considered whether to grant certiorari. *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 17 (1997).

36. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 29, 1997) (No. 97-369).

37. *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 397, *denying cert. to* 122 F.3d 692 (9th Cir. 1997).

38. Rule 10(c) of the Rules of the Supreme Court of the United States, which enumerates factors that the Court will consider in acting on petitions for writs of certiorari, states that one of the circumstances in which the Court may grant certiorari is when "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* SUP. CT. R. 10(c). The judges who dissented from the Ninth Circuit's denial of the motion to reconsider en banc the panel decision in *Coalition for Economic Equity* emphasized the importance of the constitutional issues raised by Proposition 209 and the tension that the panel decision created with existing Supreme Court precedents. *See Coalition for Econ. Equity*, 122 F.3d at 711 (Schroeder, J., joined by Pregerson, Norris and Tashima, JJ.) ("*En banc* review was warranted in this case for two reasons. First, the case is extraordinarily important. . . . Second, the decision is contrary to controlling Supreme Court precedent."); *id.* at 712-17 (Norris, J., dissenting, joined by Schroeder, Pregerson and Tashima, JJ.) (stating that the panel decision conflicts with controlling Supreme Court precedent); *id.* at 717-18 (Hawkins, J., commenting on denial of rehearing en banc) (discussing duty to follow even questionable Supreme Court precedent).

39. *See* discussion *infra* Part II.A (discussing difficulties in analysis conducted by court of appeals).

some.[40] It is also noteworthy that the Court's denial of certiorari was not accompanied by any dissent or comment from any justice,[41] although it seems likely that at least some of the justices on the current Court would have deemed the constitutional issues raised by Proposition 209 to be worthy of Supreme Court review.[42] However, the Supreme Court's certiorari practice in recent affirmative action cases has not been predictable.[43]

The Supreme Court may have denied certiorari in *Coalition for Economic Equity* because it preferred to address the constitutional issues raised by Proposition 209 in the context of a particular affirmative action program that has been invalidated under Proposition 209, rather than to resolve those constitutional issues in the context of a facial challenge. The Court has revealed a preference for contextual rather than facial adjudications of constitutional issues in other re-

40. *See* discussion *infra* Part III.B (discussing reasons why Proposition 209 does not satisfy constitutional standards that Supreme Court has applied to traditional affirmative action programs).

41. *See* Coalition for Econ. Equity v. Wilson, 118 S. Ct. 397, *denying cert. to* 122 F.3d 692 (9th Cir. 1997).

42. It is possible that the denial of certiorari in *Coalition for Economic Equity* resulted from a political compromise between Justices who were content to allow the court of appeals decision to take effect through a denial of certiorari, and Justices who opposed the court of appeals decision but feared that full Supreme Court review would result in the validation of Proposition 209 on the merits if certiorari were granted.

43. In addition to denying certiorari in *Coalition for Economic Equity*, the Court has denied certiorari in other recent affirmative action cases of national significance. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir.) (invalidating racial affirmative action program used by the University of Texas School of Law), *cert. denied*, 116 S. Ct. 2581 (1996); Podberesky v. Kirwan, 38 F.3d 147, 162 (4th Cir. 1994) (invalidating University of Maryland Scholarship program reserved for black students), *cert. denied*, 514 U.S. 1128 (1995). Although the Supreme Court denied certiorari in *Coalition for Economic Equity*, the Court recently granted certiorari, over the objection of the Solicitor General, in another affirmative action case raising statutory and potential constitutional issues under Title VII. *See* Taxman v. Piscataway Township Bd. of Educ., 117 S. Ct. 2506 (1997), *granting cert. to* 91 F.3d 1547 (3d Cir. 1996). The *Coalition for Economic Equity* Proposition 209 case will have a direct impact on the many people who are affected by every affirmative action program in the State of California, whereas the *Piscataway* Title VII case will have a direct impact on only one public high school teacher in New Jersey. *See Piscataway*, 91 F.3d at 1550-52 (adjudicating Title VII case involving decision of school board to use race as dispositive factor in decision to lay off one of two teachers having equal qualifications and equal seniority, in order to promote prospective racial diversity). However, the Piscataway case was settled by the parties prior to oral argument in the Supreme Court, thereby mooting the Supreme Court appeal. See Joan Biskupic, *Rights Groups Pay to Settle Bias Case: High Court Affirmative Action Ruling Avoided*, WASH. POST, Nov. 22, 1997, at A1; Linda Greenhouse, *Settlement Ends High Court Case on Preferences: Tactical Retreat: New Jersey School Move Leaves Affirmative Action in Limbo*, N.Y. TIMES, Nov. 22, 1997, at A1.

cent controversial cases.[44] Notwithstanding the adoption of Proposition 209, the California constitution prohibits state administrative agencies from withholding enforcement of statutory affirmative action programs until a state appellate court has formally held those programs to be invalid.[45] As a result, there will be numerous additional occasions on which the Supreme Court will be asked to determine the constitutionality of Proposition 209 in reviewing state appellate decisions as Proposition 209 begins to be applied to particular affirmative action programs in the state. Ironically, the Supreme Court may ultimately find it useful to rule on the facial validity of Proposition 209—even in the context of resolving a dispute about a particular affirmative action program—in order to avoid the need for a prolonged adjudication each time Proposition 209 is applied to yet another state affirmative action program.

If the validity of Proposition 209 varies with the validity of the particular affirmative action program at issue, the Supreme Court will have to determine the constitutionality of each California affirmative action program before it can determine the validity of Proposition 209's application to that program. The Supreme Court can avoid the need for such extensive constitutional adjudication by assuming for the sake of argument that the affirmative action program at issue in a particular case is constitutional, and by ruling on the constitutionality of Proposition 209 against that background assumption. But this would entail the very facial adjudication that the Court declined to conduct in the *Coalition for Economic Equity* case. The issue may evaporate if, as Part III.B.1 suggests, any affirmative action program that survives the Court's stringent constitutional standards is not only constitutionally permissible, but is constitutionally required as well.[46] If that is the case, then a ruling in any Proposition 209 case will effectively be a ruling in all Proposition 209 cases.

44. *See, e.g.*, Raines v. Byrd, 117 S. Ct. 2312, 2317-23 (1997) (vacating on grounds of standing lower court determination that Line-Item Veto Act violated United States Constitution); Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1067-75 (1997) (vacating on grounds of mootness lower court determinations that Arizona constitutional provision declaring English to be official language of state violated United States Constitution).

45. *See* CAL. CONST. art III, § 3.5 (prohibiting state administrative agencies from declaring unconstitutional, or otherwise refusing to enforce, any state statute, unless state appellate court has first held statute unconstitutional).

46. *See infra* Part III.B.1 (suggesting that under current Supreme Court doctrine, affirmative action programs that are constitutionally permissible may also be constitutionally compelled).

The language of Proposition 209 and the political context out of which it has emerged make the general thrust of Proposition 209 seem relatively clear. The point of the ballot initiative was to eliminate affirmative action in response to political disenchantment with the direction in which it had developed. Nevertheless, the many subtle ambiguities in Proposition 209 muddy its scope, thereby making it difficult to ascertain the precise intent of those who voted to adopt Proposition 209.[47] If facial challenges to Proposition 209 continue to be rejected, the need for judicial resolution of these ambiguities may have the ironic effect of leaving the fate of affirmative action in the hands of the courts rather than permitting it to be resolved by the voters, as proponents of Proposition 209 apparently intended.[48] The ambiguities embedded in Proposition 209 appear to stem from difficulties inherent in traditional assumptions about neutrality and merit, which in contemporary culture have increasingly come to be viewed as contestable. In this sense, Proposition 209 has become not only a referendum on affirmative action, but on the concepts of neutrality and merit themselves.

A. Thrust of the Proposition

The language of Proposition 209 seems straightforward. It amends the California Constitution by adding to the existing Article I a new section 31, which provides in part: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[49]

47. *See generally* Chemerinsky, *supra* note 24 (discussing ambiguities in Proposition 209); Gotanda et al., *Legal Implications*, *supra* note 24 (same); Volokh, *supra* note 24 (same).

48. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 102-04.

49. CAL. CONST. art. I, § 31(a). The full text of Proposition 209, as enacted in the California Constitution, states:

> Sec. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (b) This section shall apply only to action taken after the section's effective date.
>
> (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
>
> (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

This language appears to do three things. First, as the court of appeals and the district court emphasized, it reaffirms existing prohibitions on race and gender discrimination contained in the United States and California Constitutions, and in the employment discrimination provisions of Title VII of the Civil Rights Act of 1964.[50] Second, it adds a new prohibition on affirmative action by precluding the state from granting race or gender preferences to any individual or group.[51] Third, it applies this new affirmative action prohibition to the operation of three categories of state action: public employment, public education, and public contracting. Proposition 209 does not expressly address either private discrimination or private affirmative action.[52]

> (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.
>
> (f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.
>
> (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
>
> (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

CAL. CONST. art. I, § 31 [hereinafter Proposition 209]. The *Analysis by the Legislative Analyst* contained in the Ballot Pamphlet is reproduced in Gotanda et al., *Legal Implications*, *supra* note 24, app. at 105, and in Volokh, *supra* note 24, app. at 1393. Additional background information concerning Proposition 209, including the full text of the initiative and Ballot Pamphlet, as well as arguments for and against the ballot initiative, can be found at several Internet sites on the World Wide Web. *See, e.g.*, *Prop. 209: Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities* (visited Oct. 1, 1997) <http://www.democracynet.org/cgi-bin/HyperNews/get/initiatives/6.html>; *CA Secretary of State—Vote 96—Text of Proposition 209* (visited Oct. 1, 1997) <http://vote96.ss.ca.gov/BP/209text.htm>; *Proposition 209 Text* (visited Oct. 1, 1997) <http://www.wolf1.com/caprop/prop-209text.htm>.

50. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997); Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996) (emphasizing antidiscrimination provisions of Proposition 209), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

51. Like the court of appeals and the district court, I will use the term "race" to encompass color, ethnicity and national origin. *See Coalition for Econ. Equity*, 122 F.3d at 696 n.1; *Coalition for Econ. Equity*, 946 F. Supp. at 1488 n.1.

52. *See* Proposition 209, cl. a. (limiting scope of provision to measures involving state action). For the full text of Proposition 209, see *supra* note 49.

The most salient feature of Proposition 209 is its new prohibition on affirmative action. The California Ballot Pamphlet that explained the effect of Proposition 209 to voters prior to the election stressed that a "yes" vote on Proposition 209 would eliminate race- and gender-based affirmative action, while a "no" vote would leave existing state and local government affirmative action programs in place.[53] The Ballot Pamphlet went on to define "affirmative action" programs as "programs intended to increase opportunities for various groups—including women and racial and ethnic minority groups,"[54] and to explain how Proposition 209 would affect public employment, contracting and education.[55] It stated that the ballot initiative "would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs,"[56] as well as "programs that give preferences to women-owned or minority-owned companies on public contracts."[57] With respect to public education, the Ballot Pamphlet stated that Proposition 209 "could eliminate, or cause fundamental changes to, *voluntary* desegregation programs,"[58] special funding for "magnet" schools,[59] and programs "such as counseling, tutoring, outreach, [and] student financial aid,"[60] where those programs "provide preference to individuals or schools based on race, sex, ethnicity, or national origin."[61] It also emphasized that Proposition 209 would prevent the University of California and California State University from continuing to use race and gender "as factors in some of [their] admissions decisions."[62]

53. The court of appeals and the district court quoted the following language from the Ballot Pamphlet:

> A **YES** vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A **NO** vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

Coalition for Econ. Equity, 122 F.3d at 696 (alteration in original); *Coalition for Econ. Equity*, 946 F. Supp. at 1493 (alteration in original).

54. *Coalition for Econ. Equity*, 946 F. Supp. at 1493 (quoting from Ballot Pamphlet).

55. *See id.*

56. *Id.* (quoting from Ballot Pamphlet).

57. *Id.* (quoting from Ballot Pamphlet).

58. *Id.* (quoting from Ballot Pamphlet).

59. *Id.* at 1494 (quoting from Ballot Pamphlet).

60. *Id.* (quoting from Ballot Pamphlet).

61. *Id.* (quoting from Ballot Pamphlet).

62. *Id.* (quoting from Ballot Pamphlet).

The Ballot Pamphlet also included partisan arguments drafted by proponents and opponents of Proposition 209. A statement drafted by proponents of Proposition 209 argued:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.
>
> . . . .
>
> "REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG! . . . [S]tudents are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE. . . . Proposition 209 will stop [these] terrible programs . . . .[63]

A statement drafted by opponents of Proposition 209 argued:

> California law currently allows tutoring, mentoring, outreach, recruitment, and counseling to help ensure equal opportunity for women and minorities. Proposition 209 will eliminate affirmative action programs like these that help achieve equal opportunity for women and minorities in public employment, education and contracting. Instead of reforming affirmative action to make it fair for everyone, Proposition 209 makes the current problem worse.
>
> . . . .
>
> The initiative's language is so broad and misleading that it eliminates equal opportunity programs including:
>
> -tutoring and mentoring for minority and women students;
>
> -affirmative action that encourages the hiring and promotion of qualified women and minorities;
>
> -outreach and recruitment programs to encourage applicants for government jobs and contracts; and

63. *Id*. at 1494 (alterations in original) (quoting from Ballot Pamphlet); *see also* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696-97 (9th Cir.) (quoting some of the same material from Ballot Pamphlet), *cert. denied*, 118 S. Ct. 397 (1997).

-programs designed to encourage girls to study and pursue careers in math and science.[64]

The district court made factual findings concerning the effect that Proposition 209 would have on public contracting, employment, and education.[65] The government contracting programs encompassed within the Proposition 209 prohibition on affirmative action ranged from programs requiring prime contractors to make good faith efforts to hire women and minority subcontractors, to programs giving advantages to women and minority contractors in bid evaluations. The court found that these programs enabled women and minority contractors, who previously had little or no success securing work on government contracts because of prior discrimination, to establish ties with prime contractors who would not otherwise have considered using those subcontractors. In Los Angeles, for example, affirmative action programs increased the percentage of businesses operated by women obtaining City contracts from 0.3% to 8%, and the number of minority businesses obtaining City contracts from 2% to 11.8%. The district court found that Proposition 209 would reduce or even reverse such gains.[66]

In public employment, the district court found that past and present race and gender discrimination resulted in an underutilization of women and minorities in State civil service jobs, but that affirmative action had reduced this underutilization.[67] Governor Ronald Reagan's 1971 Executive Order establishing voluntary affirmative action increased the utilization of women and minorities in the California civil service.[68] Between 1979 and 1986, the "'index of gender and race segregation in state agencies'"[69] declined by 11% for women and 16% for minorities, but the implementation of Proposition 209 "would substantially reduce opportunities for women and minorities in public employment."[70]

64. *Coalition for Econ. Equity*, 122 F.3d at 697 (quoting from Ballot Pamphlet).

65. *See Coalition for Econ. Equity*, 946 F. Supp. at 1495-98. Although the court of appeals vacated the district court's preliminary injunction, it did not question the district court's findings, but, rather, held that the district court's preliminary injunction was based on "an erroneous legal premise." *See Coalition for Econ. Equity*, 122 F.3d at 698, 700-01, 705, 708.

66. *See Coalition for Econ. Equity*, 946 F. Supp. at 1495-96.

67. *See id.* at 1496-97.

68. *See id.*

69. *Id*. at 1497 (quoting Bielby Decl. ¶ 5).

70. *Id*.

In education, the district court found that affirmative action in the form of voluntary school desegregation, financial aid, and admissions programs from elementary through graduate and professional school levels, benefited women and minorities. However, in the University of California system, Proposition 209 could reduce enrollments for blacks and other minority groups by as much as 50%. In addition, knowledge of Proposition 209 could deter women and minorities from applying to schools even though they might qualify for admission. The reduced minority enrollment in medical schools was also likely to have an adverse effect on the delivery of medical services in minority communities, where minority physicians treat three to six times more patients than white physicians.[71]

The district court also found that Proposition 209 would make it very difficult for women and minorities to secure race- or gender-conscious remedial programs for past and present discrimination; they would have to amend the California Constitution either to repeal Proposition 209 or to exempt a particular program from its dictates. The California Constitution could be amended either through an arduous initiative process—the way that Proposition 209 itself amended the Constitution—or through an arduous legislative amendment process. The initiative process would require the signatures of 8% of the voters within the space of 150 days. This would mean that 7,000 signatures a day for each of those 150 days would have to be obtained, at a likely cost of $500,000 to $1.5 million. The legislative amendment process would require the lobbying expenditures necessary to secure a two-thirds majority in each House of the California Legislature. Under either process, proponents of an affirmative action program would have to expend the further time and money to secure passage of the desired program in the statewide election. When Proposition 209 was passed, the cost of these efforts exceeded $3.1 million.[72]

It seems evident that the general thrust of Proposition 209 was to end race- and gender-based affirmative action as we now know it. The California Ballot Pamphlet made voters aware that the continued existence of affirmative action was at stake in the vote on the ballot initiative, and it advised voters that the adoption of Proposition 209 would have far-reaching effects on public employment, pub-

71. *See id*. at 1498.

72. *See id*. at 1499.

lic education and public contracting.[73] Moreover, the fact that Proposition 209 would amend the State Constitution made it clear that these effects would be difficult to reverse through the ordinary political process.[74] With this knowledge, the voters of California still chose to adopt Proposition 209 by a margin of 8%.[75]

B. Unresolved Ambiguities

Despite its superficial clarity, the language of Proposition 209 contains subtle ambiguities that obfuscate, in several respects, the actual intent of the California voters who adopted the ballot initiative. The primary ambiguity in Proposition 209 arises from its distinction between prohibited "discrimination" and prohibited "preferences." Although the meanings of those terms are uncertain, the two prohibitions do seem to be in tension with each other. Proposition 209 also contains provisions governing gender discrimination that could have the effect of authorizing *more* gender discrimination than is permitted under present law. In addition, while the language of Proposition 209 prohibits preferences in the "operation of public employment, public education, [and] public contracting," it is not clear what the phrase "operation of" entails. The precise reach of the state-action provision of Proposition 209 is also ambiguous. Finally, it is uncertain whether Proposition 209 is intended to prohibit all race and gender preferences, or only those preferences that inflict some ascertainable harm on nonpreferred individuals or groups. If Proposition 209 is found to be facially invalid, these ambiguities will be largely inconsequential. But if facial challenges to Proposition 209 are rejected, the judiciary will have to resolve these ambiguities, thereby frustrating the apparent desire of Proposition 209 supporters for political rather than judicial resolution of the affirmative action debate.[76]

1. *Discrimination v. Preference.* Proposition 209 adds to article I of the California Constitution a new section 31(a), which provides that "[t]he state shall not discriminate against, or grant preferential

73. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696-97 (9th Cir.) (citing California Ballot Pamphlet), *cert. denied*, 118 S. Ct. 397 (1997).

74. *See Coalition for Econ. Equity*, 946 F. Supp. at 1498-99.

75. *See id.* at 1495.

76. For a recent article written by a proponent of Proposition 209 after its adoption, nominally offering a narrow interpretation of these and other Proposition 209 ambiguities, but nevertheless offering a broad interpretation of "discrimination" that is heavily dependent on the presence or absence of facial classifications, see Volokh, *supra* note 24, at 1136-39.

treatment to, any individual or group" on the basis of race or gender.[77] This language distinguishes between the concepts of prohibited discrimination and prohibited preferences. Assuming that the two prohibitions were not intended to be redundant—that the Proposition 209 prohibition on preferences is not a mere superfluous restriction on discrimination that had already been made unlawful—Proposition 209 must contemplate a category of race and gender preferences that are prohibited even though they are not discriminatory.[78]

The primary ambiguity in Proposition 209 is what this category of prohibited, nondiscriminatory preferences includes. The California Supreme Court has held that state constitutional provisions adopted by the people are to be interpreted in a manner that effectuates the intent of the voters.[79] Ballot initiatives are not accompanied by committee reports, conference reports or other traditional forms of legislative history that offer insight into the intent behind a law. California courts therefore consider ballot pamphlets,[80] as well as ballot summaries and arguments,[81] in seeking to ascertain the intent of the voters. The California Supreme Court has also held that deference to the democratic process requires that ballot initiatives be interpreted to uphold their validity whenever possible.[82] However, the available evidence of voter intent does little to resolve the ambiguity concerning the content of that category of nondiscriminatory preferences that are prohibited by Proposition 209. Indeed, sometimes

77. Proposition 209, cl. a. For the full text of Proposition 209, see *supra* note 49.

78. *See, e.g.*, Chemerinsky, *supra* note 24, at 1004-13 (analyzing Proposition 209's distinction between prohibited discrimination and prohibited preferences); Gotanda, *Color-Blind Vision*, *supra* note 24, at 1145-49 (same); Gotanda et al., *Legal Implications*, *supra* note 24, at 19-27 (same). *But cf.* Volokh, *supra* note 24, at 1341-46 (arguing that prohibitions on discrimination and preferences are coterminous). Presumably, the category of nondiscriminatory preferences prohibited by Proposition 209 alludes to preferences that are not prohibited by federal statutes or by the Equal Protection Clause of the United States Constitution.

79. *See* Board of Supervisors v. Lonergan, 616 P.2d 802, 806 (Cal. 1980); *see also* Gotanda et al., *Legal Implications*, *supra* note 24, at 7-14 (discussing proper interpretation of constitutional amendments by ballot initiative under California law); Volokh, *supra* note 24, at 9 (same).

80. *See* Legislature v. Deukmejian, 669 P.2d 17, 25 n.14 (Cal. 1983) (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1300 (Cal. 1978)).

81. *See* Legislature v. Eu, 816 P.2d 1309, 1315 (Cal. 1991) (citing *Amador Valley*, 583 P.2d at 1300); *Lonergan*, 616 P.2d at 807-08.

82. *See Eu*, 816 P.2d at 1313.

ambiguities are intentionally placed in ballot materials in order to advance partisan political goals.[83]

The ambiguity surrounding the category of prohibited preferences is evident from the disagreement between the California Legislative Analyst and the California Court of Appeals concerning whether outreach programs fall within the scope of the Proposition 209 preference prohibition. The ballot pamphlet prepared by the Legislative Analyst for distribution to California voters stated:

> In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin. . . .[84]

This reading seems consistent with a literal interpretation of Proposition 209 because such outreach programs necessarily constitute preferences to the extent that they are directed to particular race or gender groups, even if the ultimate selection criteria for participation in the programs are race- and gender-neutral. However, in pre-election state court litigation concerning the proper description of Proposition 209 on the ballot, the California Court of Appeals stated that:

> Most definitions of the term [affirmative action] would include not only the conduct which Proposition 209 would ban, i.e., discrimination and preferential treatment, but also other efforts such as outreach programs. . . . Accordingly, any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence "false and misleading."[85]

The state court viewed outreach programs as beyond the scope of the Proposition 209 preference prohibition, presumably because such outreach programs are commonly employed to prevent the types of discrimination that are made unlawful by the Proposition 209 discrimination prohibition. The Legislative Analyst's view was ad-

83. *See, e.g.*, Gotanda et al., *Legal Implications*, *supra* note 24, at 6 (suggesting that the ambiguities in language of Proposition 209 may have been intended by drafters).

84. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1494 (N.D. Cal. 1996) (quoting from Ballot Pamphlet); *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997); *see also* Volokh, *supra* note 24, at 1349-53 (arguing that Proposition 209 prohibits non-neutral outreach programs).

85. Lungren v. Superior Court, 55 Cal. Rptr. 2d 690, 694 (Cal. Ct. App. 1996). Judge Sims concurred in the judgment, apparently unwilling to commit himself to the view that Proposition 209 would permit outreach programs. *See id.* at 695 (Sims, J., concurring).

vanced by opponents of Proposition 209 in the argument section of the Ballot Pamphlet as a reason for voters to reject the ballot initiative.[86] The California Court of Appeals view was advanced by proponents of Proposition 209, in an apparent effort to increase political support for the ballot initiative.[87]

The disagreement between the Legislative Analyst and the California Court of Appeals reveals that the Proposition 209 discrimination and preference prohibitions are in tension with each other. Each may prohibit what the other requires. For example, consider a school that has traditionally steered boys to shop courses and girls to home economics courses, but now wishes to adopt a remedial outreach program to encourage more girls to take shop and more boys to take home economics. It is not clear how the California voters intended such a program to fare under Proposition 209. It may be that the outreach programs are required to eliminate continuing gender inequality within the meaning of the Proposition 209 discrimination prohibition, or it may be that the gender-directed programs are barred by the Proposition 209 preference prohibition. It is therefore understandable that California officials charged with interpreting Proposition 209 have been inconsistent in their views of what the ballot initiative requires.[88]

2. *Gender*. The prospective effect of Proposition 209 on gender discrimination in California is also unclear. Professor Erwin Chemerinsky has argued that Proposition 209 reduces existing legal protections against gender discrimination in several ways.[89] Section 31(c) of Proposition 209 states: "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public

86. *See supra* note 64 and accompanying text (quoting Ballot Pamphlet).

87. *See* Sally Pipes & Eugene Volokh, *Women Need Not Fear the Civil Rights Initiative; CCRI: Its Language Strengthens Rather Than Weakens Laws Against Sex Discrimination*, L.A. TIMES, Jan. 24, 1996, at B9; William A. Rusher, *Using Women in Civil Rights Fight*, SAN DIEGO UNION-TRIB., May 23, 1996, at B10. For a discussion of these articles, see Gotanda, *Color-Blind Vision*, *supra* note 24, at 1145-49.

88. For a more extended discussion of the Proposition 209 distinction between prohibited discrimination and prohibited preferences see Gotanda et al., *Legal Implications*, *supra* note 24, at 6-7, 14, 16-32; *see also* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1145-49 (analyzing the extended scope of Proposition 209); Volokh, *supra* note 24, at 1339-59 (discussing the actions that are banned by Proposition 209).

89. *See* Chemerinsky, *supra* note 24, at 1013-17; *see also* Gotanda et al., *Legal Implications*, *supra* note 24, at 75-80 (developing similar arguments about reduced protection from gender discrimination resulting from Proposition 209).

employment, public education, or public contracting."[90] Chemerinsky notes that the Proposition 209 "reasonably necessary" standard is broader than the "bona fide occupational qualification" exception that exists under Title VII of the Civil Rights Act of 1964,[91] which generally prohibits gender discrimination in employment as a matter of federal law.[92] He also notes that the language of Proposition 209 extends the "bona fide qualification" exception beyond the employment context to which it is limited under Title VII to public education and contracting, even though pre-existing law has never applied such an exception in these latter areas.[93] Although the Supremacy Clause[94] prevents Proposition 209 from superseding Title VII in the public employment context, Chemerinsky argues that Proposition 209 lowers the standard of judicial review for gender classifications in public education and contracting—cases to which Title VII does not apply.[95]

Additionally, although gender classifications have traditionally been subject to only intermediate scrutiny under the Equal Protection Clause of the federal Constitution, they have been subject to more demanding strict scrutiny under the California Constitution.[96] However, Proposition 209 replaces this stringent strict scrutiny standard with a mere rational basis standard of review that is very deferential. Chemerinsky suggests that this could allow public schools and government contracting officials to disfavor women because of stereotyped views about bona fide differences between men and women that would not have been permitted under pre-existing law.[97]

90. Proposition 209, cl. c. For the full text of Proposition 209, see *supra* note 49.

91. *See* Chemerinsky, *supra* note 24, at 1013-14.

92. *See id*.

93. *See id*. at 1014-17.

94. *See* U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

95. *See* Chemerinsky, *supra* note 24, at 1015-16.

96. *See id*. at 1015.

97. *See id*. at 1016-17. As an example of the problems that could be caused by Proposition 209, Chemerinsky suggests that some of the infamous gender disparities in funding for male and female athletic programs that have been deemed invalid under present state and federal law could now become valid. In schools that are not covered by federal law because they do not receive federal funds, such disparities could only be equalized by California law. But California law might deem those funding disparities to be reasonable responses to a greater societal interest in men's sports, and thereby uphold them under the reduced gender scrutiny that is

Eugene Volokh, a Professor at UCLA Law School, and Pamela Lewis, a California lawyer who has challenged the legality of California affirmative action programs containing set-asides and preferences, both argue that Proposition 209 does not reduce the level of protection against gender discrimination that existed under prior law.[98] They suggest that the bona fide qualifications provision of Proposition 209 does not broaden the bona fide occupational qualifications exception of Title VII and of California antidiscrimination law, but rather tolerates only a narrow range of cases in which gender classifications are warranted by factors such as privacy, hygiene or physical safety.[99] They further claim that Proposition 209 does not reduce the strict scrutiny standard of review that previously applied to gender classifications.[100] Lewis argues that the reasonably necessary language of Proposition 209 does not announce a new standard of judicial review, but merely constitutes part of the definition of a bona fide qualification.[101] Both Lewis and Volokh emphasize the language of Proposition 209, arguing that the "[n]othing in this section" qualifier of subsection (c) limits the dictates of subsection (c) of Proposition 209 to matters contained within Proposition 209 itself. As a result, the reasonably necessary standard of Proposition 209 does not extend to the autonomous equal protection provisions of the California Constitution, which will continue to require strict judicial scrutiny of gender classifications.[102] Volokh adds that under California law, Proposition 209 cannot effect an implied repeal of prior antidiscrimination standards in the absence of irreconcilable conflict, and that such conflict can be avoided simply by reading Proposition 209 to continue California's strict scrutiny of gender classifications.[103] Lewis views the assertion that Proposition 209 would reduce prohibitions on gender discrimination as a political scare tactic that was designed to frighten middle-class white women into voting against Proposition 209.[104]

prescribed by Proposition 209. *See id.* at 1017; *see also* Gotanda et al., *Legal Implications*, *supra* note 24, at 54-56 (discussing effects of Proposition 209 on gender disparities in athletic funding).

98. *See* Volokh, *supra* note 24, at 1361-64; Lewis, *supra* note 24, at 1155.

99. *See* Volokh, *supra* note 24, at 1360; Lewis, *supra* note 24, at 1155, 1157-60.

100. *See* Volokh, *supra* note 24, at 1361; Lewis, *supra* note 24, at 1160.

101. *See* Lewis, *supra* note 24, at 1156-57.

102. *See* Volokh, *supra* note 24, at 1361; Lewis, *supra* note 24, at 1160.

103. *See* Volokh, *supra* note 24, at 1361-64.

104. *See* Lewis, *supra* note 24, at 1156.

As these competing arguments demonstrate, it is difficult to ascertain the intent of California voters regarding the future of gender discrimination in the State. The Supremacy Clause[105] prevents Proposition 209 from diluting the antidiscrimination provisions of federal law, and California canons of construction seem to preclude California courts from concluding that the voters intended such a violation of federal law.[106] Accordingly, Proposition 209 may simply reflect a desire on the part of California voters to restate the demands of existing federal antidiscrimination law, as Volokh and Lewis suggest. If that were the case, however, it is not clear why the subsection (c) bona fide qualification exception had to be included in Proposition 209. If, on the other hand, Proposition 209 was intended to do something other than merely restate the pre-existing federal law of gender discrimination, it seems that its purpose must have been to ensure that state law prohibitions on gender discrimination would never exceed the requirements of federal law.[107] Accordingly, state law restrictions that supplement federal prohibitions—such as the strict scrutiny that applies to gender classifications under state but not federal law—may indeed be placed in jeopardy by Proposition 209, as Chemerinsky suggests. Once again, however, it is difficult to be confident about the intent of the California voters with respect to doctrinal matters that are too technical for the voters realistically to have understood.

3. *Nexus.* The dual Proposition 209 prohibitions on discrimination and preferences apply under Section 31(a) to "the operation of public employment, public education, or public contracting."[108] The scope of the qualifier "operation of" gives rise to an additional ambiguity in Proposition 209. Presumably, this qualifier is intended to ensure some appropriate nexus between the race or gender

105. *See* U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

106. *See supra* notes 80-82 and accompanying text (discussing California canon of construction).

107. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 77-80 (suggesting that Proposition 209 may evidence intent of California voters to adopt the minimum level of judicial scrutiny for gender classifications that is permissible under federal law).

108. Proposition 209, § 31(a). For the full text of Proposition 209, see *supra* note 49.

classification at issue, and a public employment, education or contracting practice. The qualifier therefore seems designed to serve the same function as the proximate cause limitation on tort liability,[109] or the foreseeability limitation on contract damages,[110] both of which limit legal recognition of the link between an act and its vast array of consequences. As in torts and contracts, it is difficult to determine when the Proposition 209 nexus requirement is satisfied. California law presently contains a number of race- and gender-related programs that were valid under state and federal law prior to the adoption of Proposition 209, but whose validity after adoption of the ballot initiative is uncertain. Some of these programs seem intuitively to fall within the scope of Proposition 209, and others seem intuitively to be beyond its reach, but there is no principled distinction between those two groups of programs that would warrant differential treatment under the terms of Proposition 209.[111]

The California State Civil Service Affirmative Action Program, established by Ronald Reagan when he was Governor of California, directs state agencies to "establish goals and timetables designed to overcome any identified underutilization of minorities and women in their respective organizations."[112] This program, which is valid under both Title VII and pre-Proposition 209 California law, authorizes state employers to remedy underutilization by considering race and gender when choosing among applicants who have received qualifying scores on governing civil service examinations.[113] Since it was established in the 1970s, this program has produced dramatic increases in the number of women and minorities in civil service positions, al-

109. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42 (5th ed. 1984) (discussing proximate cause limitation on tort liability).

110. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 12.14 (2d ed. 1990) (discussing foreseeability as a limitation on contract damages).

111. *See generally* Gotanda et al., *Legal Implications*, *supra* note 24, at 33-69 (discussing many programs that might be eliminated by Proposition 209); *see also* Chemerinsky, *supra* note 24, at 1004-13 (discussing the benefits of programs that might be eliminated by Proposition 209).

112. CAL. GOV'T CODE § 19,790 (West 1995); *see also* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1496-97 (N.D. Cal. 1996) (discussing Civil Service Affirmative Action Program), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997); Chemerinsky, *supra* note 24, at 1006-08 (same); Gotanda et al., *Legal Implications*, *supra* note 24, at 45 (same).

113. *See* Chemerinsky, *supra* note 24, at 1006; Gotanda et al., *Legal Implications*, *supra* note 24, at 45. It is not clear whether this program would remain valid under the Equal Protection Clause after the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, 500 U.S. 200 (1995) (apparently invalidating congressionally-adopted minority construction preference through application of strict scrutiny).

though women and minorities have yet to achieve parity with white men.[114] Similar local government programs have successfully increased the representation of women and minorities in police, fire, and public works departments.[115]

At first glance, such affirmative action programs seem to fall squarely within the scope of Proposition 209, because they authorize the use of race and gender preferences "in the operation of" public employment.[116] However, additional reflection makes it less certain that the voters of California intended to eliminate such programs when they adopted Proposition 209. Affirmative action was initially "invented" as a response to subtle forms of societal discrimination that operated against racial minorities even when they possessed the same qualifications as the whites who were customarily granted priority over them in the allocation of jobs and educational opportunities.[117] It may be that such affirmative action is still required to prevent subtle forms of societal discrimination.[118] Although it seems plain that California voters wished to terminate what they deemed to be affirmative action abuses, the voters may have been focusing on programs that substituted race and gender considerations for job qualifications, and not on programs that authorized the remedial use of race and gender as factors in choosing among qualified applicants. This view of voter intent becomes more probable in situations in which the absence of remedial programs and the ensuing resurgence of subtle or unconscious discrimination seem likely to cause agency staffs to revert to their former state of white male domination. When we differentiate among types of preferences, it is possible to conclude

114. *See Coalition for Econ. Equity*, 946 F. Supp. at 1496-97; Chemerinsky, *supra* note 24, at 1006-07.

115. *See* Chemerinsky, *supra* note 24, at 1008; Gotanda et al., *Legal Implications*, *supra* note 24, at 45-46.

116. *See, e.g.*, Volokh, *supra* note 24, at 1341-46 (arguing that Proposition 209 bans all discriminatory preferences, including "goals" and "timetables").

117. *See* Exec. Order No. 10,925, 3 C.F.R. 448, 449-50 (1959-1963), *reprinted in* 1961 U.S.C.C.A.N. 1274, 1276 (1961), *quoted in* Volokh, *supra* note 24, at 1347 n.33 ("The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."); *see also* Middleton v. City of Flint, 92 F.3d 396, 404 n.6 (6th Cir. 1996) (discussing evolution in use of term "affirmative action"); Lemann, *supra* note 24, at 40, 42 (discussing origin of "affirmative action" concept).

118. *See, e.g.*, Twyman, *supra* note 24, at 191-94 (arguing that affirmative action is necessary to combat subtle discrimination). Evidence of the continuing existence of race and gender discrimination is discussed *infra* in Part I.C.5.

that the California voters could have wished to end affirmative action abuses, but not to reinstitute subtle forms of race and gender discrimination that would again make state agencies and educational institutions white male bastions. However, if the reinstitution of white male domination *was* the intent of voters who supported Proposition 209, that intent would not only be at odds with Proposition 209's nondiscrimination provision,[119] but it would also present federal equal protection problems that could run afoul of the California canon of construction which presumes that the voters did not intend an unlawful enactment.[120] It therefore seems plausible to conclude that, despite the language of Proposition 209, California voters did not intend to eliminate all affirmative action programs, but only those programs whose elimination would not lead to a reinstitution of prior discrimination. Under such a view, the effectiveness of an affirmative action program in light of the available alternatives to that program would be dispositive. But this is a complicated nexus issue that will vary from case to case, rather than a simple issue of voter intent that is apparent from the face of the ballot initiative.

The nexus that a race or gender preference must have to public education in order to fall within the scope of the Proposition 209 preference prohibition is equally unclear. Public schools make countless curriculum and other decisions in ways that are explicitly conscious of the "race, sex, color, ethnicity, or national origin" categories that are enumerated in Proposition 209,[121] and it is unlikely that California voters intended to invalidate them all. But it is difficult to know which such decisions Proposition 209 allows and which it outlaws. Although some programs seem intuitively to be inconsistent with the anti-affirmative action thrust of Proposition 209, those programs are difficult to distinguish in any principled way from other programs that seem intuitively to be beyond the reach of Proposition 209.

Intuitively, it seems as if Proposition 209 supporters would favor the elimination of affirmative action programs like the Systemwide Affirmative Action Support Services program, which provides academic advising, tutoring, workshops and summer bridge programs to

119. *See* Proposition 209, § 31(a). For the full text of Proposition 209, see *supra* note 49.

120. *See supra* notes 80-82 and accompanying text (discussing California canon of construction). The federal equal protection problems that such an intent would present are discussed in Part III.B, *infra*.

121. Proposition 209, § 31(a). For the full text of Proposition 209, see *supra* note 49.

minority students,[122] and the California State University residential summer math and science programs for minority middle and high school girls.[123] However, the basis for this intuition is less clear. Because these programs are open to minority and female students, but not to white males, it may be that the explicit use of race and gender selection criteria is what causes the programs to seem to be prohibited by Proposition 209. But this explanation raises the question of whether the very same programs, selecting the very same students, would continue to constitute prohibited preferences if the explicit race and gender selection criteria were eliminated. Although the intent and the effect of the modified programs would be precisely the same, Proposition 209 does not indicate whether it is the intent, effect or express nature of a preference that makes it objectionable.[124]

In addition, there is no obvious default position that a court can use to determine the intent of the California voters concerning this matter. An effects test is used for purposes of federal employment discrimination law under Title VII,[125] but an intent test is used for purposes of federal equal protection law.[126] Moreover, the law surrounding each of these tests has become so complex that sometimes one test seems to be masquerading as the other,[127] and sometimes it seems as if both tests are tacitly being applied.[128] It will be very diffi-

122. *See* Chemerinsky, *supra* note 24, at 1010-11.

123. *See id.* at 1009-10; *see also* Volokh, *supra* note 24, at 1349-53 (arguing that such programs would probably be prohibited by Proposition 209).

124. *See* Chemerinsky, *supra* note 24, at 1004 (noting that Proposition 209 does not define the terms it uses).

125. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

126. *See* Washington v. Davis, 426 U.S. 229, 238-48 (1976).

127. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 649-60 (1989) (requiring Title VII plaintiffs to demonstrate a specific causal relationship between the employment practice challenged and the alleged disparate impact in employment opportunities for whites and non-whites); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-99 (1987) (elaborating the effects test requirement for Title VII plaintiffs); *see also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 40-41 (1993) (suggesting that the Supreme Court's elaboration of the effects test in *Watson* and *Wards Cove* makes it more stringent than the intent test). Congress reversed the *Wards Cove* elaboration of the effects test by passing the Civil Rights Acts of 1991. *See* Pub. L. No. 102-166, 105 Stat. 1071, 1071, 1074-75 (1991) (codified as amended in scattered sections of 42 U.S.C. §§ 2000e to 2000e-16 (1995)); *see also* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1478-80 (1995) (discussing congressional overruling of *Wards Cove* effects test).

128. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971) (upholding post-*Brown* decision to close municipal swimming pool rather than desegregate it, in seeming application of both intent and effects test, rather than nominally applicable intent test); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 619 (3d ed. 1996) (discussing *Palmer* tacit application of intent and effects test).

cult to know which sorts of preferences are prohibited under Proposition 209 prior to resolution of this issue by the California state courts, and even then, there will be virtually no way to know whether the California state courts have correctly ascertained the intent of the Californians who voted to adopt Proposition 209.

Uncertainties about the validity of educational programs are exacerbated when one focuses on curriculum decisions concerning courses and programs that are open to all students. For example, it is unclear whether Proposition 209 invalidates the California Education Code provision that requires public school curricula to include materials about Martin Luther King and the civil rights movement,[129] or prohibits research centers such as the California State University Center for African-American Educational Excellence and Achievement,[130] or prohibits the establishment of courses in African art,[131] or prohibits school assemblies celebrating Cinco de Mayo,[132] or prohibits the teaching of Ebonics to inner-city tutors.[133] Those courses and programs are nominally open to all students, but realistically, their primary intent and effect is to benefit particular racial and ethnic groups.[134] However, if such courses and programs are prohibited by Proposition 209, curriculum requirements mandating the inclusion of materials about George Washington and the American Revolution, research centers for English literature, courses in European art, school assemblies celebrating St. Patrick's Day, and the teaching of French would also seem to be prohibited.[135] It may be that Proposition 209 does not prohibit any of these courses or programs because they are designed to benefit all students by providing diversity in the range of ideas to which students are exposed as part of their general

129. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 58-59.

130. *See id*. at 59.

131. *See id*. at 57.

132. *See id*. at 59.

133. "Ebonics" is the term that recently has been applied to the English vernacular spoken by blacks in inner-city environments. *See* Tim Golden, *Oakland Scratches Plan To Teach Black English*, N.Y. TIMES, Jan. 14, 1997, at A10 (discussing controversy surrounding Oakland School Board's proposal to treat Ebonics as a second language).

134. *Cf.* Volokh, *supra* note 24, at 1348-49 (arguing that programs "whose topic is a particular race, sex, or ethnic group" are valid as long as enrollment in the programs is not facially restricted).

135. *Cf.* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1146-47 (discussing potential impact of Proposition 209's preference prohibition on subjects such as American Studies or French language courses).

education.[136] Certainly well-educated students from all backgrounds should know about the civil rights movement as well as the American Revolution, just as they should know about African art as well as European art. However, this justification would almost certainly require upholding other educational practices that most supporters of Proposition 209 probably intended to prohibit.

Most supporters of Proposition 209 probably intended to eliminate race- and gender-based admissions to educational institutions that had previously been made in the name of promoting diversity.[137] However, if the diversity justification is adequate to permit public schools to teach both African and European art, why is it not also adequate to justify the exposure of African and European art students to each other in an educational environment? The "well-rounded education" goals of both specialized courses and specialized admissions seem analogous, if not identical. Artists who have studied African art without any exposure to the history and techniques of European art have had an educational experience that is skewed and incomplete. Similarly, students who have discussed abortion or civil rights without any exposure to the perspectives of women and minorities have also had an educational experience that is skewed and incomplete. The principle of enhancing educational quality through diversity therefore seems equally applicable to both curriculum and admissions decisions.[138] The fact that supporters of Proposition 209

136. For arguments that courses with such specialized topics can benefit all students, see Gotanda et al., *Legal Implications*, *supra* note 24, at 57 (suggesting well-rounded-education justification for specialized courses and programs); Volokh, *supra* note 24, at 1348-49 (arguing that such programs can benefit all students as long as enrollment in them is not restricted on the basis of race, sex, or another of the "forbidden factors").

137. The Ballot Pamphlet argument section drafted by proponents of Proposition 209 stated "'REVERSE DISCRIMINATION' BASED ON RACE OR GENDER IS PLAIN WRONG! . . . . [S]tudents are being rejected from public universities because of their RACE . . . . Proposition 209 will stop [these] terrible programs. . . ." *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1494 (N.D. Cal. 1996) (alterations in original) (quoting from Ballot Pamphlet), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

138. It could be argued that diversity concerns are not advanced by the admission of women and minorities to educational institutions because viewpoints do not necessarily correspond to race and gender. *See* Volokh, *supra* note 24, at 1374-76 (providing some arguments against diversity justifications for gender preferences in education and employment). But whatever value such an argument might have in theory, it seems counterintuitive in practice. If people thought that nothing turned on race or gender, it would be difficult to account for the persistence of race and gender discrimination in the culture. However, because many people obviously think that important things do turn on race or gender, diversity concerns would be advanced by increased exposure in an educational context to whatever those important things are. Although it is true that many views of race and gender are based on stereotypes rather

seem to have rejected the diversity justification in the admissions context suggests that they may also have intended to reject it in the curriculum context. But the consequence of rejecting the diversity justification in the curriculum context would be the elimination of courses and programs that most California voters almost certainly did not intend to eliminate. And if those voters *had* anticipated the curricular consequences of Proposition 209, they may have changed their intent about its admissions consequences. Once again, it is unclear what intent should be ascribed to the California voters with respect to the nexus between preferences and educational programs.

Perhaps the most potentially far-reaching provision of Proposition 209 is its prohibition on race and gender preferences in public contracting. Proponents of Proposition 209 seem to have desired the elimination of enhancements or set-asides for women- and minority-owned enterprises in the award of government contracts.[139] But the language of Proposition 209 goes well beyond the likely intent of the California voters because "the operation of . . . public contracting" clause in section 31(a) of Proposition 209 is not limited to the mere award of government contracts. Rather, it appears to apply to all aspects of public contracting, including conduct that occurs in the performance of a government contract.[140] As a result, the language of Proposition 209 seems to preclude government contracts to study or treat sickle cell anemia, because the beneficiaries of those contracts will be overwhelmingly of one race, and contracts to study or treat prostate cancer, because the beneficiaries of those contracts will be overwhelmingly of one gender.[141] Proposition 209 might even prohibit the government from entering into a contract for the establishment and operation of a rape crisis center, because the primary bene-

than accurate information, it seems backwards to argue that race and gender stereotypes are more likely to be eliminated by reducing student interactions with members of other races and genders than by increasing such interactions.

139. The Ballot Pamphlet description of Proposition 209 states that "the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts." *Coalition for Econ. Equity*, 946 F. Supp. at 1493. The argument section of the Ballot Pamphlet drafted by Proposition 209 proponents states, "Contracts are awarded to high bidders because they are of the preferred RACE. . . . Proposition 209 will stop [these] terrible programs. . . ." *Id.* at 1494 (alteration in original) (quoting from Ballot Pamphlet).

140. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 68 (discussing potentially broad scope of the Proposition 209 public contracting provision). *But cf.* Volokh, *supra* note 24, at 1339-41 (arguing that scope of Proposition 209 public contracting provision can be determined through existing "state action" doctrine).

141. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 68 (discussing sickle cell and prostate cancer problems).

ficiaries of that center would be women.[142] Although such measures are facially neutral, we do not know whether the California voters intended to prohibit facial preferences, preferential intent, or preferential effects.[143] It seems unlikely that the voters intended to outlaw these types of government contracts when they adopted Proposition 209, but the language of Proposition 209 seems to prohibit such contracts.

It might be that California voters intended only to prohibit consideration of race and gender in the selection of government contract recipients, but that construction seems as underinclusive as the language of Proposition 209 seems overinclusive. Limiting the reach of Proposition 209 to the selection of contract recipients would enable the government to contract with private entities for affirmative action programs that the government might be precluded from offering directly.[144] For example, it is unlikely that Proposition 209 either permits public employers to offer special training programs for minority job applicants or permits public schools to offer special training programs for women in math and science. However, an interpretation of Proposition 209 that limited Proposition 209's public contracting preference prohibition to the mere selection of contract recipients would enable the government to enter into contracts with private contractors to run affirmative action programs. It seems that there is no simple interpretation of voter intent that gives the public contracting provision of Proposition 209 a meaning that is both coherent and intuitively plausible.

4. *State Action*. The uncertainties surrounding the Proposition 209 public contracting provision generate additional ambiguity concerning the scope of the Proposition 209 state-action restriction, which provides, "The *state* shall not discriminate against, or grant preferential treatment to . . . ."[145] By its terms, the discrimination and preference prohibitions of Proposition 209 apply to the actions of

142. *But cf.* Volokh, *supra* note 24, at 1385-86 (arguing that even if a rape crisis hotline could be linked to employment or education, it would be permissible under Proposition 209 because of the theoretical possibility that men would also use hotline).

143. *See supra* notes 122-28 and accompanying text (discussing uncertainty about test to be used in applying Proposition 209).

144. *See* Volokh, *supra* note 24, at 1339-40 (arguing that Proposition 209 should not be read to permit state to engage in non-neutral conduct by directing government contractor to engage in such conduct).

145. Proposition 209, § 31(a) (emphasis added). For the full text of Proposition 209, see *supra* note 49.

government entities, but not to the actions of private parties. However, as the nexus discussion in Part I.B.3 reveals, the Proposition 209 prohibition on discrimination and preferences in the conduct of government contracting might also extend to the practices of private parties who contract with the government.[146]

The antidiscrimination and affirmative action provisions of many federal programs extend to private recipients of federal funds. Executive Order 11,246 precludes private employers who receive government contracts from discriminating against their employees on the basis of race or gender, and imposes affirmative action requirements on large employers in connection with large contracts.[147] Title VI of the Civil Rights Act of 1964 prohibits private recipients of federal funds from engaging in race or gender discrimination,[148] and Title IX of the Education Amendments of 1972 prohibits private institutions of higher education that receive federal funds from engaging in gender discrimination in their admissions.[149] In addition, pre-Proposition 209 California law contained antidiscrimination prohibitions on private recipients of government contract funds.[150] In light of these prohibitions on private discrimination, it may be that Proposition 209 also prohibits private recipients of government contracting funds from engaging in race- or gender-based affirmative action, even though Proposition 209 by its terms applies only to the actions of state instrumentalities.[151]

In addition, Proposition 209's prohibitions might apply to private entities who establish working relationships with public entities even in the absence of a contractual relationship. For example, if a private

146. Although the Supreme Court has held that the state-action requirement of the Fourteenth Amendment is not satisfied by the actions of mere government contractors, *see* Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982), the Proposition 209 preference prohibition extends beyond the substantive scope of the Fourteenth Amendment, and it may extend beyond the scope of the Fourteenth Amendment state-action requirement as well.

147. *See* 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 3 U.S.C. § 2000e (1994).

148. *See* 42 U.S.C. § 2000d-1 (1994).

149. *See* 20 U.S.C. § 1681(a) (1994).

150. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 62-65 (describing federal and state restrictions on private recipients of government funds).

151. *See id.* at 69-75 (discussing possible application of Proposition 209 to conduct of private entities receiving government funds). *But cf.* Volokh, *supra* note 24, at 1339-40 (arguing that Proposition 209 does not restrict actions of government contractors as long as state does not require or become overly implicated in contractor's non-neutral actions). The fact that some statutes expressly extend their coverage to private recipients of government funds may indicate that the lack of a similar express provision in Proposition 209 means that the drafters of Proposition 209 did not intend for it to extend to private recipients.

law firm accepted student placements in connection with a public law school clinic or externship program, the private firm might be subject to Proposition 209 prohibitions in connection with that placement because of its relationship to the public school program.[152] The customary range of ambiguity about proper classification of quasi-governmental entities would also apply under Proposition 209. For example, entities such as the Federal Reserve Banks have been held to be public entities for some purposes, but private entities for others, including the application of antidiscrimination laws.[153] In the end, it is not clear how far California voters intended affirmative action restrictions to intrude into voluntary affirmative action programs adopted in the private sphere.

5. *Harm*. Finally, it is unclear whether Proposition 209 prohibits formal preferences based on race or gender, or whether it prohibits only preferences that inflict some actual harm of the sort that is customarily required for standing.[154] When a person of one race or gender is hired, admitted to college, or awarded a government contract because of her race or gender, the person who was denied that job, college admission, or government contract suffers a direct injury of the sort that Proposition 209 was probably intended to prohibit. However, when an employer, college or government contracting agency establishes a remedial training program for women or minorities who have been the victims of historical discrimination, it is more difficult to identify the victims of that remedial preference. Such programs do inflict some theoretical injury on white males, but the injury is abstract and undifferentiated, especially with respect to those programs that would not have been established in the absence of a perceived need to aid women and minorities. The federal law of standing has developed in a way that precludes women and minor-

152. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 74-75 (discussing public-private partnerships and the interaction of Proposition 209 with federal law).

153. *See id*. at 73-74 (discussing ambiguities in characterizing Federal Reserve Banks).

154. *Cf. id*. at 27-30 (discussing common understanding of difference between discrimination and preferences in ways that suggest importance of degree and particularity of injury); Gotanda, *Color-Blind Vision*, *supra* note 24, at 1139, 1145, 1147 (discussing whether affirmative action preferences necessarily deny rights or benefits to others). The district court considered but rejected a distinction between zero-sum affirmative action programs that benefit women and minorities at the expense of white males and affirmative action programs that did not have this zero-sum feature, finding that the distinction was not relevant under Supreme Court precedents. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1502-03 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

ities from challenging such abstract and undifferentiated forms of societal discrimination,[155] and a symmetrical reading of Proposition 209 would similarly deny standing to white males who challenge equally abstract and undifferentiated forms of societal affirmative action.[156] Accordingly, the California voters who adopted Proposition 209 may have intended to outlaw only affirmative action preferences that inflicted traditionally cognizable forms of injury, and not affirmative action remedies that entailed only formal departures from the ideal of race and gender neutrality without inflicting any particularized injury on an identifiable victim. Stated differently, California voters who believe that race and gender discrimination in the culture has systemic causes may also believe in the need for systemic remedies to end that discrimination.

Although the general anti-affirmative action sentiment of Proposition 209 is clear at an abstract theoretical level, there are many uncertainties about the intent of the California voters who adopted Proposition 209 with respect to the future of particular public employment, public education, and public contracting programs. If the district court view of the voters' intent prevails, and Proposition 209 is ultimately held to be unconstitutional on its face, these uncertainties will be relegated to mere academic interest. However, if the court of appeals view continues to prevail, and Proposition 209 is ultimately held not to be facially invalid, subsequent rounds of litigation will be necessary both to establish contextual meanings of Proposition 209 as a matter of state law, and to resolve the constitutionality of those meanings as a matter of federal law. Whichever view prevails, as a result of the many uncertainties embedded in Proposition 209, the courts will end up having the final say about proper resolution of the affirmative action issue, just as they did prior to the enactment of Proposition 209.[157] Such a result is ironic, as the whole point of Proposition 209 was to take the affirmative action issue away from the legislatures and the courts, and to have it resolved by popular plebiscite through the ballot initiative process. One of the reasons that the contextual meanings of Proposition 209 are so difficult to ascertain is that Proposition 209 does not rest on a shared con-

155. *See* Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663-64 (1993) (discussing established standard that standing requires concrete, particularized and redressable injury).

156. *But see id.* at 666 (granting standing to challenge affirmative action program despite apparent absence of concrete, particularized and redressible injury).

157. *See* Gotanda et al., *Legal Implications*, *supra* note 24, at 102-04.

ception about the nature and scope of discrimination in contemporary culture. Assuming an absence of invidious intent, both proponents and opponents of Proposition 209 would seem to desire the same goal. Both want to eliminate from contemporary society the remaining vestiges of race and gender discrimination; but proponents and opponents of Proposition 209 appear to view contemporary society in very different ways.

C. Contestable Assumptions

Proposition 209 rests on the assumption that prospective race and gender neutrality constitutes the preferred strategy for eliminating unwanted discrimination from contemporary culture. Proponents of Proposition 209 believe that such neutrality will promote the allocation of societal resources on the basis of merit rather than race or gender, thereby allowing us to evolve into a society that is both just and efficient. Accordingly, Proposition 209 supporters wish to eliminate affirmative action because they view race and gender preferences as simply a means of perpetuating the discrimination that undermines our efforts to become that society.

Opponents of Proposition 209, however, view affirmative action as the most promising strategy for eliminating modern forms of race and gender discrimination, which are often too subtle, unconscious and systemic to be neutralized through mere reliance on antidiscrimination laws that require prospective neutrality. They argue that past guarantees of race and gender neutrality have not succeeded in eliminating discrimination, and that affirmative action has proved to be the only effective method of redressing our persistent discrimination problems. Accordingly, Proposition 209 opponents view insistence on prospective neutrality, measured by reliance on traditional indices of merit, as simply another form of discrimination.

The force of these competing arguments depends upon the coherence of the concepts that underlie them. To the extent that the concepts of neutrality and merit are meaningful in contemporary society, the Proposition 209 strategy for eliminating discrimination has logical appeal. However, to the extent that our history renders these concepts incoherent, Proposition 209 appears sophomoric and counterproductive. Because the coherence of neutrality and merit is now being vigorously contested, the Proposition 209 debate is best understood as a debate about the continued utility of these concepts in the formulation of social policymaking.

1. *Morality*. From the beginning, Proposition 209 supporters have claimed the moral high ground.[158] The Ballot Pamphlet arguments drafted by proponents of Proposition 209 state:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences and set-asides.
>
> . . . .
>
> "REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG! . . . [S]tudents are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE . . . . Proposition 209 will stop [these] terrible programs.[159]

This language does not *argue* that RACE OR GENDER-based allocations of societal resources are undesirable. Rather, it *assumes* that such allocations are self-evidently "PLAIN WRONG!" This moral stance seeks to impose upon opponents of Proposition 209 the burden of justifying any race- or gender-based departures from the status quo. Inherent in this position is the belief that the status quo—the present allocation of societal resources—is morally acceptable, or at least morally superior to any race- or gender-conscious reallocation.

The Proposition 209 movement took great pains to define itself as a movement committed to ending discrimination rather than a movement designed to perpetuate it. The ballot initiative effort was commenced in the early 1990s by Proposition 209 authors Glynn Custred and Tom Wood, two middle-aged white academics who had become disillusioned with affirmative action because they thought it was reviving the obsession with racial classifications that had been prevalent in the pre-civil rights South.[160] The ballot initiative was formally named the "California Civil Rights Initiative," and its initial

158. *See* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1135 (noting claim of moral superiority asserted by proponents of Proposition 209).

159. *See Coalition for Econ. Equity*, 946 F. Supp. at 1494 (alterations in original) (quoting from Ballot Pamphlet); *see also* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 696-97 (9th Cir.) (quoting from Ballot Pamphlet), *cert. denied*, 118 S. Ct. 397 (1997).

160. *See* Lemann, *supra* note 24, at 39-40 (discussing revival of southern pre-civil-rights obsession with racial classification).

wording was intentionally based on antidiscrimination language taken from the Civil Rights Act of 1964.[161] Proponents of Proposition 209 invoked colorblind rhetoric from Martin Luther King, Jr. in support of their cause,[162] and prompted voters to recall the personal feelings of injustice that they experienced when they had lost jobs or educational opportunities to less-qualified women or minority candidates who ended up performing poorly.[163] The moral legitimacy of Proposition 209 was enhanced for some when the anti-affirmative action movement attracted the support of prominent blacks such as writer Shelby Steele and University of California Regent Ward Connerly.[164] Proponents of Proposition 209 also formed an advocacy organization, named Californians Against Discrimination and Preferences (CADP), that supported the ballot initiative, initiated litigation to end affirmative action in California, and later intervened as a defendant in the *Coalition for Economic Equity* case.[165]

The anti-affirmative action arguments of Proposition 209 proponents stressed both the illegitimacy of racial classifications and the inefficiency of permitting affirmative action to interfere with a merit-based allocation of societal resources. The Proposition 209 founders established a California Civil Rights Initiative Homepage on the World Wide Web containing information and arguments offered in support of the ballot initiative.[166] The introductory message from founders Glynn Custred and Tom Wood states:

> This is an historic campaign which is aimed at building a better and more inclusive California, where all can develop a sense of belonging and full participation, without regard to race, gender, or

161. *See id.* (discussing history of Proposition 209).

162. *See id.*; *see also* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1136 & n.2 (discussing invocation of Martin Luther King, Jr.'s vision of colorblind America on California Civil Rights Initiative Internet World Wide Web Homepage); Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy To Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 108 (1996) (discussing use of Martin Luther King, Jr.'s "colorblind" rhetoric by supporters of Proposition 209).

163. *See* Lemann, *supra* note 24, at 39-40 (discussing use of affirmative action "horror stories").

164. *See id.* at 40 (discussing black support for Proposition 209).

165. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1505 n.26, 1506 n.29, 1520 (N.D. Cal. 1996) (discussing CADP involvement in anti-affirmative action litigation), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

166. *See Public Affairs Web* (visited Oct. 1, 1997) <http://www.publicaffairsweb.com/ccri/>.

> ethnic origin. . . . We look forward to your participation and support to realize this noble goal."[167]

An introductory message from Governor Pete Wilson states:

> CCRI is an historic initiative that will end government-mandated racial preferences in California and usher in a new era of equal opportunity for all of the people of this state. It will end the fundamentally un-American practices of quotas, set-asides and preferences that are dividing our people along racial and gender lines.
>
> . . . .
>
> These discriminatory preferences only serve to pit American against American, and group against group. We can no longer ignore the harm it is doing by dividing our state and nation.
>
> . . . .
>
> By joining me and the more than one million Californians who lent their signatures in support of the California Civil Rights Initiative, you can strike a blow for the principles of equal opportunity and individual merit.[168]

University of California Regent Ward Connerly, chairman of the "Yes on Proposition 209" campaign, included a message stressing the need for Proposition 209 to restore merit-based admissions to California public schools:

> The report released by the UCB [Berkeley] and UCLA management demonstrates the depth to which racial preferences are being used at these campuses. If after Prop. 209 passes, the number of under represented minority students at these campuses drops by roughly 50%, we should all realize that students were being admitted to attend UCB and UCLA because of their race over other more qualified students.
>
> . . . .
>
> The opposition to Prop. 209 continues to tell the public that without preferences Black, Latino and other minority students will not be admitted to UC campuses. That is plain wrong. Any student who meets the UC qualifications is guaranteed a UC education. The question is who will be admitted to the most prestigious campuses—

167. *Id.*

168. Pete Wilson, *State of California* (last modified June 17, 1996) <http://www.publicaffairsweb.com/ccri/wilson.htm>.

> Berkeley and UCLA, the best and brightest students we have to offer or students who, without a racial preference, would not otherwise gain admission?
>
> . . . .
>
> If we are not adequately preparing certain groups of minority students to successfully compete for admission to UC Berkeley and UCLA, then we must address that problem head on. We should not continue to fool ourselves—or students—into thinking that we are adequately educating minority populations simply because we meet a certain quota in admissions. The real question is: would those students gain admission on merit alone. And if not, why? And if so, why are we demeaning their achievements by calling them affirmative action admits?[169]

These Proposition 209 arguments echo the more general neutrality- and merit-based arguments that have been offered against affirmative action in other contexts.[170]

As Proposition 209 gained grass roots popularity, it also began to gain the support of national politicians and high-profile institutions. Republican success in the 1994 elections moved anti-affirmative action sentiment from the conservative fringe to the middle of the political spectrum. Republican presidential candidates including Bob Dole, Phil Gramm and Pete Wilson all adopted public campaign positions opposing racial preferences, and President Clinton, as part of his re-election campaign, ordered an internal review of federal affirmative action programs.[171] Bills were introduced in both Houses of Congress to prohibit affirmative action.[172] In California, the Board of

169. *See Connerly Responds to UC Report on Prop. 209* (visited Nov. 1, 1997) <http://192.41.11.185/ccri/pr/844238300.html>.

170. *See, e.g.*, HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION 17-18 (1991) (commenting that racial preferences are inconsistent with color-blind ideal originally incorporated into Civil Rights Act of 1964); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1318-23 (1986) (claiming that race-conscious remedies exacerbate racial tensions in a way that is inconsistent with equal-opportunity goals of civil rights movement); Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 43-45 (1992) (advocating restoration of race-neutrality in civil rights laws); Clint Bolick, *Discriminating Liberals*, N.Y. TIMES, May 6, 1996, at A15 (likening affirmative action to *Plessy v. Ferguson* racial classification).

171. *See* Lemann, *supra* note 24, at 36.

172. *See, e.g.*, Chemerinsky, *supra* note 24, at 1001 (discussing House and Senate bills to eliminate federal affirmative action); Lemann, *supra* note 24, at 36 (discussing the repeal of the FCC minority distress sale tax certificate program); Kevin Merida, *Senate Rejects Gramm Bid to Bar Affirmative Action Set-Asides*, WASH. POST, July 21, 1995, at A13 (describing legislative

Regents of the University of California, led by Governor Wilson and Regent Ward Connerly, voted to end three decades of affirmative action in University hiring and admissions.[173] Governor Wilson also issued an Executive Order limiting California outreach programs for women and minorities in state hiring, education, and contracts,[174] and filed suit in state court challenging the constitutionality of affirmative action programs being implemented by certain California state agencies.[175] On November 6, 1996, the day after California voters adopted Proposition 209, Governor Wilson issued an Executive Order directing state agencies to promulgate implementing regulations. Attorney General Daniel Lungren instructed state agencies immediately to comply with Proposition 209 to the extent permitted by California law.[176]

Despite the Proposition 209 claim of moral legitimacy, support for Proposition 209 has been polarized. Overall, the California electorate adopted Proposition 209 by a vote of 4,736,180 (54%) to 3,986,196 (46%).[177] Demographically, however, whites and males were the only race or gender groups to vote in favor of the measure. Whites voted in favor of Proposition 209 by a margin of 63 to 37 percent, and men voted in favor of the ballot initiative by a margin of 61 to 39 percent.[178] Women voted against Proposition 209 with 48% in favor and 52% opposed. Only 26% of blacks were in favor of the measure while 74% were opposed.[179] Latinos voted against Proposition 209 with 24% in favor and 76% opposed and Asians voted against it with 39% in favor and 61% opposed.[180] White males, there-

efforts by Phil Gramm and Bob Dole to limit affirmative action); Abigail Thernstrom, *A Class Backwards Idea: Why Affirmative Action for the Needy Won't Work*, WASH. POST, June 11, 1995, at C1 (describing a bill introduced by Rep. Charles T. Canady to end preferences in federal programs).

173. *See* B. Drummond Ayres, Jr., *California Board Ends Preferences in College System*, N.Y. TIMES, July 21, 1995, at A1; William Booth, *U. of Calif. Ends Racial Preferences: Pioneer in Diversity Adopts Stance Urged by Gov. Pete Wilson*, WASH. POST, July 21, 1995, at A1.

174. *See* Vicki Torres, *State May Be in the Minority in Affirmative Action Stance; Hiring: Corporations Continue to Increase Outreach Efforts Even in the Wake of Appeals Court Ruling*, L.A. TIMES, Apr. 10, 1997, at D1.

175. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 n.13 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

176. *See id.* at 1495.

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.* at 1495 n.12.

fore, were the demographic group most persuaded by the moral claims offered in support of Proposition 209.

Opponents of Proposition 209 are unwilling to concede the moral high ground to Proposition 209 supporters. They view as highly suspect both the claim that Proposition 209 advances race and gender neutrality and the claim that it promotes merit-based allocations of resources. Indeed, for many opponents of Proposition 209, the concepts of neutrality and merit lack meaningful content. While Proposition 209 supporters claim that neutrality and merit describe a natural state of affairs that affirmative action preferences improperly distort, Proposition 209 opponents view neutrality and merit as surrogates for normative preferences that favor one race or gender over another. Proposition 209 opponents therefore view policy arguments grounded in an appeal to neutrality or merit as arguments that actually favor the continuation of race and gender discrimination.

2. *Neutrality*. Professor Neil Gotanda argues that the "color-blind vision" invoked by proponents of Proposition 209 as a forward-looking solution to race discrimination problems is actually a backward-looking invocation of a nineteenth century white supremacist mentality that interferes with our ability to solve contemporary problems associated with discrimination.[181] Gotanda identifies a logical tension inherent in the concept of racial colorblindness. Unlike the medical condition of colorblindness, which precludes the ability to perceive different colors, the social aspiration of colorblindness advocated by Proposition 209 entails the nonrecognition of racial factors after they have already been perceived. Race and gender are such salient social characteristics that it is unrealistic to expect that they will go undetected in most circumstances. Therefore, an employer, school admissions officer or government contracting officer evaluating an applicant will first note the applicant's race and gender, and will then seek to disregard all of the attributes associated with the applicant's race or gender before making a decision.[182] Assuming that this conscious disregard is possible in light of the unconscious race and gender biases that we

181. *See* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1135-37; *see also* Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 2-3 (1991) (arguing that the Supreme Court's use of "color-blind constitutionalism" legitimates white Americans' social, political and economic advantages and thereby helps to maintain those advantages).

182. *See* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1139-40.

have all been socialized to possess,[183] a conscientious decisionmaker would almost certainly wish to evaluate the applicant's past performance in light of the social and economic difficulties that the applicant had to overcome. It is hard to imagine doing this without again considering the applicant's race or gender. Moreover, if the decisionmaker also wishes to consider the applicant's likely ability to deal with future race or gender discrimination that the applicant may encounter in the position for which he or she is being considered, it is impossible to do so without yet again considering the applicant's race or gender.[184] As long as the categories of race and gender remain socially relevant, as they always have been in the past and seem destined to remain in the foreseeable future, the disregard of race and gender considerations in the allocation of societal resources will artificially distort the allocation process.

Gotanda argues that the disregard of race and gender considerations is far from neutral. Instead, such disregard assumes that all race- and gender-correlated characteristics are valueless and unworthy of attention.[185] As an illustration of the problem that this assumption can cause, Gotanda points to *Hopwood v. Texas*,[186] in which the United States Court of Appeals for the Fifth Circuit invalidated, on equal protection grounds, a racial affirmative action program that the University of Texas School of Law used to increase the enrollment of black and Mexican-American students.[187] In invalidating the program, the Fifth Circuit rejected the precedential value of the Supreme Court's decision in *Regents of the University of California v. Bakke*,[188] in which Justice Powell's frequently cited opinion endorsed the limited use of racial preferences in college admissions for the purpose of increasing the diversity of the student body.[189] In rejecting the *Bakke* diversity rationale, the *Hopwood* court was either denying that race, ethnicity and gender could bring distinctive perspectives to

183. *See infra* notes 211-19 and accompanying text (discussing unconscious prejudices).

184. *See* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1140-41 (discussing the difficulty of assessing an African-American female candidate's past ability to overcome racial adversity without thinking about her race).

185. *See id.*

186. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

187. *See id*. at 945.

188. 438 U.S. 265 (1978).

189. *See id.* at 311-20 (opinion of Powell, J.). Despite the Fifth Circuit's departure from *Bakke*, the Supreme Court denied certiorari in *Hopwood*. *See* Thurgood Marshall Legal Soc'y v. Hopwood, 116 S. Ct. 2580 (1996).

classroom discussions, or was discounting the value of adding those perspectives to the law school environment.[190]

Gotanda argues that the colorblind disregard of race and gender perspectives advocated by cases like *Hopwood* and ballot initiatives like Proposition 209 is not innocent happenstance. Rather, the vision of colorblindness they invoke is the same vision of colorblindness the first Justice Harlan endorsed in his famous *Plessy v. Ferguson* dissent.[191] Although Justice Harlan dissented from the majority's decision to tolerate official segregation, he did so confident that the white race was, in his words, "the dominant race in this country . . . in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage."[192] For Gotanda, Proposition 209's vision of colorblindness does not encompass racial fairness or justice, but rather is the contemporary form of the same racial superiority that was commonplace in the nineteenth century, when Harlan wrote his *Plessy* dissent.[193] Gotanda's skepticism about the concept of neutrality is shared by other commentators.[194]

190. *Cf.* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1141-45 (using the Court's conclusion that only *remedial purposes* are fostered by affirmative action to assert that the court did not recognize the educational merit of diversity).

191. *See* 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

192. *Id.* at 559 (Harlan, J., dissenting).

193. *See* Gotanda, *Color-Blind Vision*, *supra* note 24, at 1144, 1149-51 (comparing the Fifth Circuit's racial vision of the Fourteenth Amendment articulated in *Hopwood v. Texas*, 78 F.3d 932, 939-40 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), with the racial vision embodied by Proposition 209).

194. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 139 (1992); ROY L. BROOKS, INTEGRATION OR SEPARATION: A STRATEGY FOR RACIAL EQUALITY 204-06 (1996); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE 69-73 (1995); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO vii-x, 3-138 (1994); CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 67-87 (1997); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1060-63 (1991); John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. J. 25, 28-29, 33, 73-80 (1997); Chang, *supra* note 24, at 1123-33; Marianne Constable, *The Regents on Race and Diversity: Representations and Reflections*, 55 REPRESENTATIONS 92, 96 (1996); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 162-69 (1994); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1844-47 (1994); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979, 1980-84 (1993); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1766-91 (1993); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transforma-*

3. *Merit.* The concept of merit has become as contestable as the concept of neutrality. Philosopher Iris Marion Young argues that opposition to affirmative action based on a preference for merit-based allocation of resources ignores the connection between social power and the criteria used to measure merit. As a result, the concept of merit is used to defend the unjust oppression of marginalized social groups through the allocation of resources to members of socially privileged groups who satisfy the criteria that they themselves have identified as comprising merit.[195] Young argues that the merit principle can apply meaningfully only when it is "possible to identify, measure, compare, and rank individual performance of job-related tasks using criteria that are normatively and culturally neutral," but because "impartial, value-neutral, scientific measures of merit do not exist . . . a major issue of justice must be who decides what are the appropriate qualifications."[196] Young further argues that the present focus of the affirmative action debate on distributive consequences of particular allocation schemes diverts our attention from the structural features of society that permit privileged groups continually to oppress marginalized groups.[197] Accordingly, Young believes that the proper focus of the affirmative action debate should be the broader goal of ending oppression rather than the narrower goal of modifying the distribution of resources.[198]

Young argues that an impartial, value-neutral measure of merit cannot exist because the components of merit are simply too complex to be identified for all but the most mundane social activities.[199] We simply do not know what combination of verbal skill, technical skill, intelligence, imagination, judgment, discretion, organizational skill, charisma, charm, diligence, and the like is necessary to make a good employee, student or government contractor. Even if we did, we would still know very little about how to assess in advance which candidates for a job, school admission or government contract pos-

tion, 47 STAN. L. REV. 819, 819-22 (1995); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 48-63 (1995).

195. *See generally* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 192-225 (1990).

196. *Id*. at 193.

197. *See id*. at 199.

198. *See id*. at 192-93, 198-200.

199. *See id*. at 202.

sessed the requisite combination of characteristics.[200] When the white males who presently possess most of the social power try to assess the presence of merit in candidates, they use criteria that test for normative cultural attributes rather than merit. For example, an insistence on traits such as obedience, loyalty, positive attitude, articulateness, appearance, and ability to work well in groups simply measures the degree to which candidates share the cultural attributes that the decisionmakers value rather than measuring any objective presence of merit.[201]

Aware that cultural bias undermines the legitimacy of our assessments of merit, we tend to rely on educational achievement and standardized tests as ways of measuring merit in a manner that is less culturally biased. However, educational achievements and standardized tests can rarely be validated in ways that establish a correlation with objectively desirable performance.[202] Moreover, those measures are themselves culturally biased.[203] Educational opportunities require money and social status that largely restrict such opportunities to the social classes that already have access to them.[204] As members of less-privileged classes begin to acquire educational credentials, credential inflation raises the educational requirements for particular positions so that they remain effectively restricted to members of the privileged classes who possess the better credentials.[205] Standardized tests also reflect cultural biases in favor of attributes such as competitiveness, ability to work well alone, ability to work quickly, ability to abstract, and possession of skills that are detected by questions with yes-or-no answers.[206] Not surprisingly, success on such tests tends to correlate with race, gender, and social class.[207]

Young views the assessment of merit as "political" in the sense that it implicates factors that are proper subjects for collective discussion and decisionmaking, but the concept of merit has become an ideology that focuses discussion on the presence or absence of merit in particular cases rather than on the features that should comprise

200. *See id*. at 202-04 (noting that jobs are too complex to allow for precise identification of tasks or measurement of performance of those tasks).

201. *See id*. at 204-06.

202. *See id*. at 207.

203. *See id*. at 208-09.

204. *See id*. at 207.

205. *See id*.

206. *See id*. at 209.

207. *See id*. at 206-10.

merit. She argues that the most just and least oppressive response to the elusive problem of merit is for all affected social groups to have democratic input into a non-hierarchical determination of what factors ought to govern the allocation of societal resources.[208] However, the present system of merit-based allocations is "coded" so that white males end up being the ones who possess most of the merit.[209] Young's skepticism about the concept of merit is shared by other commentators.[210]

The Proposition 209 prohibition on affirmative action makes sense only to the extent that race and gender discrimination are conscious activities. To the extent that discrimination is an unconscious or systemic phenomenon, it cannot be remedied through an act of will, because the mere desire to refrain from engaging in acts of discrimination cannot prevent discriminatory acts of which the discriminator is unaware. Therefore, the only way to address unconscious discrimination is through systemic remedies such as affirmative action programs, but Proposition 209 appears to preclude most affirmative action.[211] This preclusion poses a serious problem if most acts of contemporary discrimination turn out to be unconscious.

4. *Unconscious Discrimination*. Professor Charles Lawrence has argued that unconscious discrimination is pervasive in contemporary culture because the culture possesses discriminatory attitudes that are

208. *See id*. at 210-14.

209. *See id*. at 222.

210. *See, e.g.*, FISH, *supra* note 194, at vii-x, 3-138; Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, *in* DUNCAN KENNEDY, SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 34, 73-80 (1993); LAWRENCE & MATSUDA, *supra* note 194, at 91-111; John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2219 (1992); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1720-45 (1995); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1220 (1991); Murray, *supra* note 24, at 1073-76; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 778-79; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968-97 (1996); Twyman, *supra* note 24, at 187-89.

211. Commentators who argue that affirmative action is needed to end lingering race and gender discrimination include BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 32-61 (1996); BELL, *supra* note 194, at 139; DELGADO, *supra* note 194, at 69-73; ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 107-46 (1992); Delgado, *supra* note 210, at 1720-45; Oppenheimer, *supra* note 24, at 924-25; David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 99-100.

transmitted to each of us through the process of socialization.[212] Lawrence finds ubiquitous examples of unconscious prejudice: Sportscaster Howard Cosell's slip of the tongue in referring to a black football player in racially demeaning terms on national television; Nancy Reagan's expressed wish that her husband Ronald Reagan could be present to "see all these beautiful white people;" and a liberal white person's effort to express friendship to a black person by saying "I don't think of you as black," are well-known examples.[213] More substantively, the Supreme Court's decision not to order immediate school desegregation after *Brown v. Board of Education* seems to have reflected more solicitude for white opposition to desegregation than for the educational needs of black children—a form of judicial discrimination that was presumably more unconscious than intentional.[214] The Court's actions may also have been motivated by unconscious racial stereotypes concerning the unsuitability of black schools for the education of white children. In addition, unconscious stereotypes can cause a white applicant to be perceived as more qualified than a black applicant with respect to subjective traits such as congeniality or thoughtfulness in the eyes of white decisionmakers who must choose between the two.[215]

Lawrence emphasizes that one of the costs of viewing discrimination as a problem traceable to individual fault is that it places subtle and systemic unconscious discrimination beyond the reach of legal remedies.[216] No matter how real or harmful systemic discrimination may be, it is not legally cognizable unless the court can identify an intentional discriminator who has engaged in some form of conscious wrongdoing.[217] In prescient anticipation of the Proposition 209 movement, Lawrence notes that this fault-based view of discrimination also increases popular resistance to affirmative action. Whites and males who must bear the burdens of affirmative action preferences feel unfairly abused because they are being forced to suffer in order to benefit women and minorities, who have not been found to be the victims of conscious discriminatory acts. This reinforces the view that women and minorities are inferior because they cannot

212. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322, 329-31 (1987).

213. *See id.* at 339-41.

214. *See Brown I*, 347 U.S. 483, 493 (1954).

215. *See* Lawrence, *supra* note 212, at 342-44.

216. *See id.* at 321-23.

217. *See id.* at 324.

compete on their own, and it further exacerbates tensions between race and gender groups.[218] Lawrence's view of the significance of unconscious discrimination is shared by other commentators.[219]

5. *Lingering Discrimination.* One consequence of the Proposition 209 prohibition on race and gender preferences is that current levels of societal discrimination are likely to go unremedied. They are too subtle to be reached by antidiscrimination laws, and under Proposition 209 they can no longer be addressed through affirmative action programs. One's feelings about this situation are likely to be a function of how bad one deems current levels of race and gender discrimination to be. Proposition 209 proponents apparently believe that current societal discrimination against women and minorities has been reduced to acceptably low levels through the enforcement of state and federal antidiscrimination laws.[220] Proposition 209 opponents, however, focus on prejudicial attitudes and statistical disadvantages that still confront women and minorities as evidence that current levels of societal discrimination remain unacceptably high.

After surveying a number of social science studies on discriminatory attitudes and practices in the United States, Professor David Oppenheimer has concluded that race and gender discrimination remains a serious problem.[221] In the last fifty years, the number of white Americans openly espousing racial discrimination has declined, but numerous studies show that whites still harbor significant levels of covert prejudice against racial minorities.[222] Of the whites who openly oppose racial discrimination in employment and housing, only 33% favor federal enforcement of employment discrimination laws like Title VII, and 50% oppose federal, state or local laws prohibiting

218. *See id.* at 324-26.

219. *See, e.g.*, BELL, *supra* note 194, at 139; DELGADO, *supra* note 194, at 69-73; SPANN, *supra* note 127, at 22, 25, 81, 163; YOUNG, *supra* note 195, at 193-97; Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 810-12 (1994); Delgado, *supra* note 210, at 1720-45; Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 92; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900-02 (1993).

220. The Ballot Pamphlet argument section supporting Proposition 209 stressed reliance on antidiscrimination laws rather than affirmative action as the appropriate means of achieving race and gender equality. *See supra* note 63 and accompanying text.

221. *See* Oppenheimer, *supra* note 24, at 946-97.

222. *See id.* at 947.

homeowners from refusing to sell to someone on the grounds of race or color.[223] As recently as 1983, 34% of white Americans favored laws prohibiting racial intermarriage, and in 1978 when given the choice between desegregation, strict segregation or "something in between," 60% of white Americans favored "something in between," and only 35% favored desegregation.[224] Over half the white Americans surveyed rated blacks and Hispanics as less intelligent than whites, and 36% rated Asians as less intelligent than whites.[225] Sixty-two percent rated blacks as less hard working than whites, 54% rated Hispanics as less hard working, and 34% rated Asians as less hard working.[226] Oppenheimer emphasizes that white decisionmakers are likely to act on these views when making employment decisions.[227]

Oppenheimer also surveyed studies that demonstrate statistical underrepresentation of women and minorities in many areas of American life.[228] White students tend to go to better schools than minority students, and per-pupil expenditures tend to be significantly higher for white students than for minority students.[229] Notwithstanding common beliefs, more alumni children are admitted to Harvard through special admission programs than are black, Hispanic and Native American students combined.[230] In employment, minorities earn less than whites. White women earn 72% of what men earn, and minority women earn even less.[231] White men are 43% of the workforce, but they constitute 97% of the top executives.[232] Black unemployment is 2.76 times higher than white unemployment.[233] Employment discrimination claims are overwhelmingly filed by women and minorities, while employment discrimination against white males is rare.[234] Racial segregation in housing is dramatic. Over 83% of blacks in the twenty northern metropolitan areas with the largest black populations live in segregated neighborhoods, regardless of

223. *See id*. at 948-49.
224. *See id.* at 949-50.
225. *See id.* at 951.
226. *See id*.
227. *See id*. at 952.
228. *See id*. at 958-96.
229. *See id.* at 960-66.
230. *See id*. at 965.
231. *See id.* at 966-67.
232. *See id.* at 967.
233. *See id.* at 968.
234. *See id*. at 969.

their income levels.[235] Minorities are less likely to own homes than whites, and minority homes have a significantly lower median value.[236] Studies of racial steering indicate that 50%-60% of black homeseekers encounter racial discrimination in the housing market.[237] Oppenheimer surveyed additional studies showing similar race and gender discrimination patterns in areas of health care, economic opportunity, crime victimization, and poverty.[238] Oppenheimer's conclusions about the scope of existing race and gender discrimination in contemporary culture are shared by other commentators.[239] Moreover, in an exhaustive statistical study of affirmative action in law school faculty hiring, Professors Merritt and Reskin found that affirmative action gave white women and minority men only modest advantages over white male candidates. Minority women secured no affirmative action advantage whatsoever over white males in law school hiring; however, the study did show that gender bias against women remained persistent, despite the supposed existence of affirmative action preferences.[240]

Proponents and opponents of Proposition 209 seem to live in different worlds. Proponents tend to view the problems of past race and gender discrimination as largely solved, so that the most serious threat to equality in contemporary culture is discrimination against white males resulting from affirmative action preferences. As a result, Proposition 209 proponents wish to return to a merit-based sys-

235. *See id.* at 975.

236. *See id.* at 976.

237. *See id*. at 976-77.

238. *See id*. at 978-96.

239. *See e.g.*, BERGMANN, *supra* note 211, at 32-61; ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 34-51, 69-83 (1990) (describing the "race problem" as an extension beyond statistical inequality, as a grid of class stratifications with inherently inequitable conditions); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 11-25 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) (describing the continuing conditions of poverty, segregation, discrimination, and social fragmentation to be of "serious proportions" for black Americans); HACKER, *supra* note 211, at 121; LAWRENCE & MATSUDA, *supra* note 194, at 71-74; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 148-85 (1993); GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, at 5-11 (1994); SPANN, *supra* note 127, at 121-22; GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT 20 (1995); Chemerinsky, *supra* note 24, at 1004-13 (discussing the deleterious effects Proposition 209 would have in the areas of public employment, public education, and public contracting).

240. *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 204-06, 299-300 (1997).

tem of allocating resources in order to move society closer to its race- and gender-neutral aspirations. Opponents of Proposition 209 tend to view the persistence of race and gender discrimination in contemporary culture as a substantial problem. Because such discrimination reflects unconscious biases that are built into our concepts of neutrality and merit, Proposition 209 opponents believe that affirmative action programs offer the only hope of neutralizing these subtle and systemic forms of lingering discrimination. It is the battle between these two views of contemporary culture that is at stake in the debate over the constitutionality of Proposition 209.

II. DOCTRINAL INDETERMINACY

Determining the constitutionality of Proposition 209 is no easy matter. The doctrinal rules that govern the validity of Proposition 209 under the Equal Protection Clause of the Fourteenth Amendment are largely indeterminate, and therefore provide little guidance about the proper resolution of the Proposition 209 constitutional dispute. The conflicting reasoning offered by the court of appeals and the district court in support of their respective holdings reveals this indeterminacy. The court of appeals decision upholding Proposition 209 views Proposition 209's prohibition on race and gender preferences as a ban on race and gender discrimination, thereby making Proposition 209 consistent with, rather than violative of, the Equal Protection Clause. The district court opinion invalidating Proposition 209 on equal protection grounds views Proposition 209's selective ban on race and gender preference as an unconstitutional race and gender classification. Despite their reliance on doctrine, both opinions are difficult to defend on doctrinal grounds.

A. The Court of Appeals Opinion

The three-judge panel of the United States Court of Appeals for the Ninth Circuit in *Coalition for Economic Equity* emphatically upheld the constitutionality of Proposition 209. The court of appeals held that there could be no "conventional" equal protection violation because, by prohibiting race and gender preferences, Proposition 209 merely restated the requirements of the Equal Protection Clause, and could not, "as a matter of law and logic" violate the Equal Protection

Clause.[241] The court of appeals also held that Proposition 209 did not restructure the California political process in a way that violated the Equal Protection Clause.[242] Although the court expressed skepticism that women and minorities, who together constitute a majority of the State electorate, could restructure the political process in a way that violated their own equal protection rights,[243] the court chose to root its political structure holding in the belief that Proposition 209 did not discriminate on the basis of race, but rather addressed race-related matters in a neutral fashion.[244] The court added that, even if Proposition 209 did restructure the political process in a way that made it more difficult for women and minorities to obtain preferences through the political process than it was for other groups to obtain such preferences, that burden ultimately resulted not from Proposition 209 alone but also from the stringent standards that the Equal Protection Clause itself imposes on race and gender classifications.[245] Both of these holdings ultimately rest on the court's assumption that Proposition 209 is race- and gender-neutral. But that assumption is difficult to defend.[246]

241. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

242. *See id.* at 704-05.

243. *See id.*

244. *See id.* at 705-07.

245. *See id.* at 708-09.

246. The court of appeals panel was reviewing a district court order granting a preliminary injunction that barred implementation of Proposition 209 pending a trial in the district court. Although the three-judge court of appeals panel was initially presented with only the question of whether to grant a stay of the district court order pending appeal, the panel chose to defer ruling on the stay application and to assume jurisdiction over the merits of the state's appeal from the district court order. *See id.* at 699. Such an assumption of jurisdiction over the merits by a panel presented with an application for a stay is unusual, but it is apparently authorized by Ninth Circuit precedent. *See id.* at 699 n.5. Nevertheless, some commentators viewed the panel's expansion of its jurisdiction as a politically-motivated effort by a conservative panel to ensure that it would be able to rule on the merits of the Proposition 209 constitutional controversy. *See* Dolan, *supra* note 24, at A1; Claiborne, *supra* note 24, at A1; Golden, *supra* note 24, at A4.

As has been noted, Proposition 209 contains many ambiguities concerning the proper scope of its application that have yet to be resolved by the California state courts. *See supra* Part I.B (discussing state law ambiguities concerning scope of Proposition 209). The court of appeals emphasized its familiarity with recent Supreme Court precedent disfavoring the adjudication of constitutional claims asserted against state enactments in the absence of a controlling state court interpretation. *See Coalition for Econ. Equity*, 122 F.3d at 699-700 (citing Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1072 (1997)). Nevertheless, the court of appeals agreed with the district court that there was no need to order abstention or otherwise delay a federal court constitutional ruling on Proposition 209 pending an authoritative state court interpretation of the ballot initiative. *See id.* at 700. Like the district court preliminary

1. *"Conventional" Equal Protection Analysis.* The assumption of race and gender neutrality on which the court of appeals relies is most explicit in what the court terms its "conventional" equal protection analysis, which treats the claim of neutrality as if it were self-evidently correct.[247] According to the court of appeals, the antidiscrimination objectives of both Proposition 209 and the Equal Protection Clause are the same, and Proposition 209 cannot therefore logically be deemed to violate the Equal Protection Clause.[248] That argument might make sense with respect to the antidiscrimination provision of Proposition 209, because both the antidiscrimination provision and the Equal Protection Clause contain prohibitions on discrimination that are stated at high enough levels of generality to make them appear analogous.[249] However, the preference prohibition of Proposition 209 is stated at a lower level of generality, which gives

injunction, the court of appeals panel disposition addressed the constitutionality of Proposition 209 on its face, rather than as applied in particular contexts. The district court did make extensive factual findings, *see* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1493-99 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. (1997), but the district court's preliminary injunction broadly extended to all affirmative action programs in public employment, public education, and public contracting. *See id*. at 1520-21. Although the court of appeals did not discuss the matter, the panel's decision to uphold the constitutionality of Proposition 209 on its face does not mean that *all* applications of Proposition 209 are constitutionally valid. Technically, it means only that at least *some* applications of Proposition 209 are valid, thereby making it improper for the district court to have preliminarily enjoined implementation of Proposition 209 in all its applications. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (stating that facial challenge can prevail only when "no set of circumstances exists under which the Act would be valid"). Nevertheless, the tone of the court of appeals decision suggests that the panel deemed Proposition 209 to be constitutionally valid in all of its applications. *See Coalition for Econ. Equity*, 122 F.3d at 701 ("As a matter of 'conventional' equal protection analysis, there is simply no doubt that Proposition 209 is constitutional."). Moreover, the panel did not remand for a trial to sift the constitutional from the unconstitutional applications of Proposition 209, but rather remanded only "for further proceedings consistent with this opinion." *See id*. at 711.

In addition to the equal protection issues that are discussed herein, the court of appeals also held that Proposition 209 was not preempted, under the Supremacy Clause of the United States Constitution, by Title VII of the Civil Rights Act of 1964, which authorizes affirmative action in some circumstances. *See id*. at 709-10.

247. *See Coalition for Econ. Equity*, 122 F.3d at 702 ("If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence."). The court of appeals treatment of Proposition 209 mirrors the self-evident-neutrality depiction of Proposition 209 that had been advanced by Proposition 209 proponents in the Ballot Pamphlet. *See supra* note 159 and accompanying text.

248. *See Coalition for Econ. Equity*, 122 F.3d at 702 ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender.").

249. The antidiscrimination provision of Proposition 209 states, "The state shall not discriminate against . . . any individual or group on the basis of race, sex, color, ethnicity, or na-

it both a more specific content and a capacity to violate the Equal Protection Clause.[250] As has been discussed, unless the preference prohibition of Proposition 209 is a superfluous restatement of the antidiscrimination provision, the preference prohibition must bar race and gender preferences even when those preferences are not themselves discriminatory.[251]

The Proposition 209 preference prohibition applies even in the absence of discrimination, so it is not coextensive with the Equal Protection Clause, which only prohibits discrimination. And contrary to the court of appeals holding, it is logically possible for the Proposition 209 preference prohibition to violate the Equal Protection Clause. Such a violation will occur whenever the concept of equality embodied in the Equal Protection Clause requires the preferential treatment that Proposition 209 forbids. This can occur whenever two individuals or groups are not similarly situated.[252] For example, the Equal Protection Clause probably requires the addition of women's restrooms at formerly all-male law schools once the schools begin to admit women, even though the addition of women's rooms would constitute a gender-based preference. Because men and women are differently situated with respect to restroom facilities at a law school that has only men's rooms, a women's room preference would not promote discrimination, but rather would be required to end discrimination. Accordingly, the court of appeals cannot be correct that the Proposition 209 prohibition on all race and gender preferences is necessarily neutral and therefore necessarily consistent with the Equal Protection Clause.

It is not easy to determine when the Equal Protection Clause requires a preference. Whether a particular preference promotes or undermines the goal of equality in a particular case is a function of the perspective that an analyst brings to the case. For example, if two

tional origin . . . ." Proposition 209, § 31(a); *see also supra* note 49 (quoting full text of Proposition 209). The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

250. The preference prohibition provision of Proposition 209 states "The state shall not . . . grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin . . . ." Proposition 209, § 31(a).

251. *See supra* Part I.B.1 (discussing distinction between discrimination and preference prohibitions of Proposition 209).

252. *See generally* STONE ET AL., *supra* note 128, at 564-70 (discussing the nature of "equality" with respect to equal protection review); *cf.* North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) (holding "color-blind" pupil assignment unconstitutional as an inadequate remedy for prior school segregation).

runners are competing against each other in a footrace, but the lead runner has been given an unfair head start, a rule that requires the lead runner to stop running until the trailing runner can catch up seems appropriate to neutralize the lead runner's unfair advantage. The equality concept embodied in the Equal Protection Clause would seem to require, rather than prohibit, such an equalization rule. But the equalization rule would also constitute a preference, because it would permit the trailing runner to run toward the finish line for some period of time while the lead runner was forced to stand still. To someone who witnessed the race from the start, the preference would seem justified as a means of equalizing an unequal situation produced by the lead runner's head start—much as race and gender preferences seemed justified to the district court that enjoined implementation of Proposition 209. But to someone who only began to pay attention to the race after it was already underway, the rule requiring the lead runner to stop while the trailing runner had a chance to catch up would look like an unfair preference. Because the inattentive observer was not focusing on the head start that the rule was trying to neutralize, the rule would seem self-evidently unfair—much as race and gender preferences seemed to the court of appeals. To both observers, the rule would confer a preference on the disadvantaged runner, but whether the preference seemed to promote equality or discrimination would depend on the perspective of the observer.

An observer's perspective is determined by the baseline facts that are taken for granted when an equal protection analysis is performed. The observer who watched the race from the beginning would consciously consider the lead runner's head start in determining the fairness of granting a preference to the trailing runner. However, the observer who started watching in the middle of the race would deem the trailing runner's preference to be unfair because the observer assumed that the race had begun with a fair start. More precisely, the mid-race observer probably never thought about the start of the race at all. That observer's fair-start assumption belied the baseline separating the facts that the observer consciously considered from the facts that the observer simply assumed to be true. It was part of that vast array of background assumptions that we all bring to our analytical activities without conscious contemplation, unless we are given some particular reason to question them. If the existence of a head start had been called to the mid-race observer's attention—if that fact had been raised above the baseline separating

facts that are simply assumed from facts that are consciously considered—the observer would probably have concluded that the trailing runner's preference was an appropriate equalizing preference. On the other hand, if the observer who witnessed the start of the race were to learn that the trailing runner had previously wagered that she could beat the lead runner even if the lead runner were given a head start, it would no longer seem appropriate to force the lead runner to stop and wait for the trailing runner to catch up. Conscious questioning of the fair-start assumption, whose unconscious influence operated beneath each observer's baseline, would change each observer's view of the need for an equalizing preference. Two observers are more likely to reach the same fairness conclusions if they share the same baseline assumptions when they undertake their analyses.

When the court of appeals glibly deemed all preferences to be objectionable, it was ignoring the centrality of perspective and baseline assumptions to a proper equal protection analysis. As the footrace and restroom examples demonstrate, differential treatment may be required to promote equality if individuals or groups are not similarly situated as an initial matter. Moreover, a refusal to permit differential treatment would constitute an act of discrimination to the extent that it froze or perpetuated the effects of a pre-existing inequality. That insight, of course, is the theory behind race- and gender-based affirmative action programs designed to neutralize the advantages that white males have historically given themselves over women and minorities.

Whether the Equal Protection Clause prohibits or actually requires an affirmative action preference is a complex contextual question whose resolution ultimately turns on which baseline facts are deemed relevant to the equal protection analysis. If the extant body of evidence concerning the lingering effects of prior discrimination is deemed relevant, then the Proposition 209 prohibition on remedial preferences seems discriminatory.[253] But, if that body of evidence is ignored, the preference prohibition seems neutral. Accordingly, a meaningful equal protection analysis of the Proposition 209 preference prohibition would make some effort to determine which baseline facts concerning prior discrimination are appropriate to consider and which are properly deemed beyond the scope of judicial recogni-

253. *See supra* Part I.C.5 (discussing persistent race and gender discrimination in contemporary culture).

tion. The court of appeals, however, offered no such analysis. In order to make its focus on prospective neutrality seem appropriate, the court simply assumed that *no* judicially cognizable effects of past discrimination presently exist. In essence, the court merely looked up in the middle of the race without ever considering whether anyone had previously enjoyed a head start. Proposition 209 may be race- and gender-neutral in this formal, inattentive sense, but it is a form of neutrality that lacks any normative appeal.[254]

The court of appeals deferred to Proposition 209's own characterization of itself as race- and gender-neutral, but the court should have scrutinized that characterization more carefully. In fact, the court should have subjected the threshold characterization issue to heightened equal protection scrutiny. Because proper characterization of Proposition 209 turns on the analysis of complicated baseline assumptions, the court of appeals should have used heightened scrutiny to identify and evaluate the baseline assumptions that it was making, and to explain why it was rejecting the baseline assumptions that it found to be inappropriate. *Washington v. Davis* arguably holds that heightened scrutiny is not triggered until *after* a court has determined that a classification constitutes a race or gender classification.[255] However, the court may have refined that holding in *Adarand Constructors, Inc. v. Pena*.[256] In its effort to explain why heightened scrutiny should apply to benign as well as to invidious classifications, the *Adarand* Court emphasized that heightened scrutiny was required in order to ascertain whether a purportedly benign classifica-

254. In fairness to the court of appeals, the panel seems tacitly to have adopted what may well have become the dominant Supreme Court view on this issue. An apparent majority of the current Supreme Court believes that the lingering effects of general societal discrimination are simply too subtle to be judicially cognizable for equal protection purposes. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-99 (1989); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 610-14 (1995) (O'Connor, J., dissenting) (arguing that the interest in increasing racial diversity of broadcast viewpoints is not a compelling interest so as to warrant strict scrutiny); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (1986) (O'Connor, J., concurring in part and in judgment) (criticizing the majority's reliance on the goals of "societal discrimination" and providing "role models" to withstand strict scrutiny, rather than the School Board's interest in remedying its own past discrimination). That view seems to have contributed markedly to the perception that invidious discrimination has become largely a phenomenon of the past, and that affirmative action is the problem that now poses the most serious threat to the equal protection principle. *See generally* Spann, *supra* note 194, at 48-63 (discussing tacit Supreme Court presumption that invidious discrimination no longer poses a significant social problem). That view also seems to be at the heart of popular sentiment favoring anti-affirmative action measures such as Proposition 209.

255. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

256. 515 U.S. 200 (1995).

tion was *really* benign or was surreptitiously invidious.[257] The Court viewed that inquiry as simply too complex to be determined by anything less than heightened scrutiny.[258] The inquiry into whether a categorical prohibition on affirmative action constitutes a race or gender classification seems to be at least as complex, in light of the difficult baseline determinations that a court should make in order to resolve that inquiry properly. The reasoning of *Adarand*, therefore, suggests that where a threshold classification issue is complex, heightened scrutiny should be applied to enhance the reliability of a court's characterization of the threshold classification. The application of heightened scrutiny provides the only way to prevent a race or gender classification from evading detection by masquerading as something other than a race or gender classification—which is precisely what Proposition 209 seems successfully to have done before the court of appeals.[259]

The assertion of the court of appeals that the Proposition 209 prohibition on race and gender preferences was neutral rather than discriminatory is just that—an assertion. The court wrongly assumed that prospective neutrality could never be discriminatory, because it never questioned its baseline assumptions about the relevance of past discrimination. As a result, the court's analysis is strikingly incomplete. It offers little assistance in ascertaining whether the Proposition 209 preference prohibition is neutral or discriminatory. Although the doctrinal issue is a complex one, the court of appeals opinion sidesteps the issue, substituting *ipse dixit* for legal analysis.

2. "*Political Structure" Analysis.* The view that Proposition 209 is race- and gender-neutral is also central to what the court of appeals termed its "political structure" analysis. The court of appeals held that, contrary to the district court conclusion, Proposition 209 did not restructure the California political process in a manner that violated

257. *See id.* at 226.

258. *See id.* at 226-27.

259. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702, 708-09 (9th Cir.) (treating Proposition 209's prohibition on state classification of individuals by race or gender as race- and gender-neutral for the purposes of equal protection analysis), *cert. denied*, 118 S. Ct. 397 (1997). Similar analytical difficulties are posed in the voting rights context where heightened scrutiny would seem to be required in determining whether racial considerations impermissibly "predominate" over traditional districting principles in a voter apportionment plan, even though heightened scrutiny is not technically triggered until after the "predominance" determination has been made. *See* Spann, *supra* note 194, at 60 (discussing difficulties entailed in interpretation of *Miller v. Johnson*, 515 U.S. 900 (1995)).

the Equal Protection Clause.[260] The court first asserted that women and minorities collectively constituted a majority of the electorate, and expressed skepticism about the existence of equal protection constraints on the power of the majority to disadvantage itself.[261] The court then held that Proposition 209 did not impermissibly restructure the political process because Proposition 209's neutrality command prevented it from constituting a race or gender classification within the meaning of the Supreme Court's political structure cases.[262] Finally, the court suggested that the special burdens imposed on the ability of women and minorities to secure preferences through the political process ultimately resulted not from Proposition 209, but from the Equal Protection Clause itself.[263]

The "political structure" that the court of appeals and the district court both address stems from a series of cases in which the Supreme Court held that a state's restructuring of its political process in a way that disadvantages racial minorities can sometimes constitute an equal protection violation. In *Hunter v. Erickson*,[264] the Supreme Court invalidated an amendment to the Akron, Ohio City Charter that effectively precluded the Akron City Council from adopting fair housing ordinances without the majority approval of Akron voters.[265] The Supreme Court held that the Charter Amendment constituted an unconstitutional racial classification that violated the Equal Protection Clause because it made it more difficult to secure the enactment of fair housing ordinances that minorities tended to favor than it was to secure the enactment of ordinances regulating any other aspects of real estate transactions.[266] The Supreme Court applied similar reasoning in *Washington v. Seattle School District No. 1*[267] to invalidate a statewide ballot initiative that effectively precluded local school boards from adopting busing plans to facilitate school desegregation.[268] Most recently, in *Romer v. Evans*,[269] the Supreme Court invalidated on equal protection grounds an amendment to the Colorado

260. *See Coalition for Econ. Equity*, 122 F.3d at 701-06.
261. *See id*. at 704-05.
262. *See id*. at 707.
263. *See id*. at 708.
264. 393 U.S. 385 (1969).
265. *See id*. at 387, 393.
266. *See id*. at 390-93.
267. 458 U.S. 457 (1982).
268. *See id*. at 462-63, 470-82.
269. 116 S. Ct. 1620 (1996).

Constitution that barred any division of Colorado State or local government from taking actions to prohibit discrimination against individuals with nontraditional sexual preferences.[270] The fatal defect in each of these three cases was the restructuring of the political process in a way that required a disadvantaged group to take some extraordinary action—obtaining a charter amendment, ballot initiative or state constitutional amendment—in order to protect its political interests, while those who opposed the interests of the disadvantaged group could have their way simply by utilizing the ordinary political process.

The problem with applying a political structure analysis is that not all of the Supreme Court's political restructuring cases have been decided the same way. In *Crawford v. Board of Education*,[271] a case decided on the same day as *Seattle*, the Supreme Court held that the Equal Protection Clause did not invalidate a California constitutional amendment that effectively prohibited California state courts from ordering busing as a remedy for de facto school segregation—a remedy that the California Supreme Court had previously held to be required by state law under the California Constitution.[272] *Crawford* made no serious effort to distinguish *Seattle* in terms of political restructuring.[273] However, *Crawford* did cite a number of cases for the proposition that the Supreme Court's political restructuring doctrine did not prevent a state from simply repealing a measure that had previously benefited racial minorities.[274] The opinion also contained dic-

270. *See id*. at 1626-29. Although *Romer* can be read as a political restructuring case, *see, e.g.*, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 704, 707 (9th Cir.) (treating *Romer* as a political restructuring case), *cert. denied*, 118 S. Ct. 397 (1997); Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1510 (N.D. Cal. 1996) (same), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997), *Romer* is better understood as a case that turns on the presence of discriminatory animus. *See infra* Part III.B.3 (discussing significance of *Romer*). Although *Romer* contains some political restructuring language, *see* 116 S. Ct. at 1626-27, it also distances itself from the political restructuring analysis used by the Colorado Supreme Court to invalidate the Colorado constitutional amendment, *see id*. at 1624.

271. 458 U.S. 527 (1982).

272. *See id*. at 529-31, 535-36.

273. *See id*. at 536 n.12 (offering a weak distinction of *Seattle*). Justice Powell, the author of the majority opinion in *Crawford*, dissented in *Seattle*, thereby suggesting that he may not have viewed the two cases as distinguishable. *See Seattle*, 458 U.S. at 488 (Powell, J., dissenting). Indeed, a five-justice majority of the court thought that the two cases were indistinguishable. Chief Justice Rehnquist and Justices Powell, Burger, and O'Connor thought that the enactments in both cases were constitutional, and Justice Marshall thought that the enactments in both cases were unconstitutional. *See Crawford*, 458 U.S. at 528 (enumerating votes of justices); *Seattle*, 458 U.S. at 458 (enumerating votes of justices).

274. *See Crawford*, 458 U.S. at 538-39.

ta distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters."[275]

The court of appeals resolution of the political restructuring issue rests on the same neutrality assumption that undermined its conventional equal protection analysis. The court was initially troubled by the suggestion that Proposition 209 could restructure the political process in a way that unconstitutionally burdened women and minorities because women and minorities collectively comprised a majority of the electorate that adopted Proposition 209, and the court did not see how the *majority* could choose to burden *itself* in a way that violated the Equal Protection Clause.[276] Although the court viewed this problem as particularly "compelling" with respect to women, because women themselves constitute a majority of the California electorate,[277] the court relegated its skepticism to dicta rather than elevating it to the level of holding.[278] Nevertheless, the court's discussion implicates its neutrality assumption.

Leaving aside the thorny issue of how one identifies majority and minority preferences in a coalition voting environment,[279] the court of appeals seems to be responding to a representation-reinforcement-based concern that would limit judicial intrusion into the political process to interventions that are necessary to protect underrepresented political minorities whose interests might be sacrificed by politically more powerful majorities.[280] The court of appeals appears to think that Proposition 209 is neutral in representation-reinforcement terms because the women and minorities whom it disadvantages collectively outnumber the white males whom it benefits,

275. *Id.* at 538.

276. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 704-05 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

277. *See id*. at 705 n.13. The court did not consider the relevance of the fact that a majority of women voted against Proposition 209. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1495 n.12 (N.D. Cal. 1996) (noting that 48% of women voted in favor of Proposition 209 while 52% voted against it), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

278. *See Coalition for Econ. Equity*, 122 F.3d at 705.

279. *See generally* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows At Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2122-43 (1990) (describing social choice theory insights based on Arrow's Theorem concerning cycling difficulty entailed in seeking to ascertain majority preferences through democratic processes).

280. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (elaborating representation-reinforcement theory of judicial review).

which gives women and minorities the power to protect themselves in the political process. This argument is not a silly one. The constitutional government that the framers envisioned was meant to rely primarily on the formation of transitory political coalitions for the protection of minority rights.[281] Nevertheless, it is not clear that the court of appeals appreciated the full significance of its offhanded comment.

Under the now dominant *Marbury v. Madison*[282] model of judicial review, the Supreme Court has assumed the role of protecting the individual rights of minorities and women through heightened scrutiny of race- and gender-based governmental classifications.[283] Therefore, when the court of appeals questioned whether women and minorities could properly be viewed as victims of majoritarian enactments, it did three significant things. First, it challenged the present vitality of the *Marbury* model by questioning the need for continued judicial protection of politically underrepresented groups. Second, it subjected women and minorities to the risk of overt discrimination, for if women and minorities now possess the ability to protect themselves from burdensome political restructuring, they must also possess the power to protect themselves from explicit race and gender discrimination. Third, it called into question the Supreme Court's recent line of cases invalidating majoritarian affirmative action programs on equal protection grounds, even though such programs entailed a decision by the majority to impose burdens on itself.[284] Whether or not the court of appeals view has ultimate merit, the court of appeals seems to have been unaware of the scope of its dictum, and it has certainly failed to develop the arguments that would be necessary to justify such a major jurisprudential revolution.

The court of appeals held that Proposition 209 did not restructure the political process in a way that violated the Equal Protection Clause because the Proposition 209 preference prohibition is not a race or gender classification.[285] The court offered three arguments to

281. *See generally* STONE ET AL., *supra* note 128, at 5-23 (discussing Madisonian republicanism and structural safeguards for minority rights).

282. 5 U.S. (1 Cranch) 137 (1803).

283. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (prescribing strict scrutiny for racial classifications); United States v. Virginia, 116 S. Ct. 2264, 2275 (1996) (requiring "exceedingly persuasive" justification for gender classifications) [hereinafter *The VMI Case*].

284. *See supra* note 13 and accompanying text.

285. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d. 692, 707-09 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

support this conclusion, but all three arguments simply beg the question of Proposition 209's neutrality. First, the court quoted the language in *Crawford* distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters."[286] The court held that Proposition 209 merely addressed race- and gender-related matters in a neutral fashion, and was therefore not unconstitutional.[287] But this holding is true only if one adopts an analytical baseline that assumes away all lingering effects of prior discrimination. If one adopts a different baseline that considers past discrimination, Proposition 209 reemerges as a discriminatory effort to preclude any remedy for that prior discrimination. As was the case with its conventional equal protection discussion, the court of appeals offered no justification for its baseline selection, and showed no awareness of the baseline-assumption problem.[288]

Second, the court invoked *Crawford* to support the proposition that neither the Equal Protection Clause nor the Supreme Court's political restructuring cases prevented a state from merely repealing a race or gender preference.[289] The court then argued that Proposition 209 was constitutionally valid because Proposition 209 merely repealed the California race and gender preferences that had predated its adoption.[290] This argument does little more than restate the problem, though, because *all* of the Supreme Court's political restructuring cases involved a repeal of some pertinent preference.[291] In *Crawford*, the Supreme Court stated that the distinction between the repeals that had been upheld and the repeals that had been invalidated was whether the repeal "allocate[d] governmental or judicial power on the basis of a discriminatory principle."[292] Under *Crawford*, therefore, the constitutional validity of Proposition 209's repeal of race and gender preferences turns once again on whether Proposition 209 is itself neutral or discriminatory.

Third, the court of appeals held that Proposition 209 was controlled by the *Crawford* line of political restructuring cases, rather

286. *Id*. at 705 (quoting Crawford v. Board of Educ., 458 U.S. 527, 538 (1982)).

287. *See id*. at 709.

288. *See supra* notes 252–54 and accompanying text (discussing baseline assumptions).

289. *See Coalition for Econ. Equity*, 122 F.3d at 705-06.

290. *See id*. at 709.

291. *See supra* notes 264-75 and accompanying text (discussing political restructuring cases).

292. Crawford v. Board of Educ., 458 U.S. 527, 541 (1982).

than the *Hunter* and *Seattle* line, because Proposition 209 did not single out antidiscrimination laws for special treatment, but rather invalidated all race and gender preferences.[293] This argument, of course, is yet another way of asserting that Proposition 209 is neutral rather than discriminatory. The court of appeals did not deny that Proposition 209 singles out race and gender preferences for special treatment based on their content—race and gender preferences are prohibited, while all other preferences are allowed. But the court emphasized that Proposition 209 does not discriminate among race and gender preferences based on the viewpoints that they espouse—Proposition 209 is neutral with respect to such preferences, prohibiting them all, whether they favor men, women, whites or minorities.[294] Once again, proper characterization of Proposition 209 turns on the perspective of the analyst. But once again, the court of appeals offered no doctrinal or policy reason for focusing on the ways in which Proposition 209 is neutral while disregarding the ways in which it is discriminatory.

Finally, the court of appeals held that even if Proposition 209 did restructure the political process, it was not unconstitutional because it did not deny anyone a right to equal treatment.[295] In so doing, the court not only implicated its contestable assumption of neutrality yet again, but the court seems to have committed a logical error as well. The court of appeals reasoned that Proposition 209 prohibits *preferential* treatment, but not the *equal* treatment that is required by the Equal Protection Clause.[296] This claim, however, is not responsive to the equal protection challenge that has been leveled against Proposition 209. The challenge asserts not that Proposition 209 is unconstitutional because it fails to permit preferences that favor women and minorities, but rather because it fails to permit preferences that favor women and minorities *while permitting* preferences that favor all other groups. It is by permitting preferences for veterans, and alumni children, and golfing partners at the country club—preferences for everyone except women and minorities—that Proposition 209 allegedly discriminates against women and minorities in a way that violates the Equal Protection Clause.

293. *See Coalition for Econ. Equity*, 122 F.3d at 707.

294. *See id*.

295. *See id*. at 707-09.

296. *See id*. at 708.

What the court of appeals needed to uphold the constitutionality of Proposition 209 was a justification for Proposition 209's special treatment of race and gender preferences that would withstand the heightened scrutiny that applies to suspect classifications under the Equal Protection Clause. What the court of appeals offered was the assertion that "[t]he alleged 'equal protection' burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes."[297] In other words, the court of appeals argued that Proposition 209 was justified in singling out race and gender classifications for special treatment because the Equal Protection Clause of the Constitution itself demands such special treatment. This argument, however, ignores the fact that meaningful application of the Proposition 209 preference prohibition extends only to those race and gender preferences that are *valid* under the Equal Protection Clause. (Invalid preferences are already prohibited by the Equal Protection Clause and by the anti-discrimination provision of Proposition 209). If the Equal Protection Clause does not prohibit the race and gender preferences barred by Proposition 209, compliance with the Equal Protection Clause cannot constitute a justification for Proposition 209's discriminatory invalidation of race and gender preferences.

Thus far in its opinion, the court of appeals had offered no justification whatsoever for the Proposition 209 imposition of special political burdens on women and minorities, let alone a justification that could survive heightened scrutiny. Then, in an abrupt change of direction that undermined the relevance of its prior discussion, the court of appeals suddenly appeared to recognize that the race and gender preferences prohibited by Proposition 209 were valid under the Equal Protection Clause of the Fourteenth Amendment. The court stated, "[t]hat the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether."[298] The court then added that "[t]he Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."[299] Once again, however, the court's discussion was wholly nonresponsive. It is true that the Constitution will often permit a state to abstain from the adoption of race and gender preferences, but that is not the issue raised by Proposition

297. *Id*.

298. *Id*.

299. *Id*. at 709.

209. The issue is whether a state that chooses to adopt other types of preferences can constitutionally do so without adopting race and gender preferences as well. As a doctrinal matter, the court of appeals opinion offers no help at all in determining what the proper resolution of that issue should be.

Each of the arguments offered by the court of appeals ultimately rests on the court's belief that Proposition 209 is race- and gender-neutral. This observation is true of the court's assertion that Proposition 209 does not violate the Equal Protection Clause under "conventional" analysis, and it is also true of the court's assertion that Proposition 209 does not restructure the political process in a way that discriminates against women and minorities. Whether the preference prohibition of Proposition 209 is properly characterized as neutral or discriminatory will be a function of whether existing levels of race and gender discrimination in contemporary culture are considered or ignored in conducting an equal protection analysis of Proposition 209. The court of appeals adopted an analytical baseline that ignored the existence of such lingering discrimination, but the court offered no justification for why that baseline was appropriate. As a result, the court of appeals opinion seems more like a reflection of political preference than the product of doctrinal analysis. But this feature also colors the district court opinion finding equal protection problems with Proposition 209.

B. The District Court Opinion

The district court in *Coalition for Economic Equity* issued a preliminary injunction preventing implementation of Proposition 209 pending a full trial on the merits of the claim that Proposition 209 was unconstitutional.[300] The district court found as a matter of fact that women and minority members of the plaintiff class would suffer irreparable injury from Proposition 209's invalidation of race and gender preferences,[301] and concluded as a matter of law that Proposition 209 was likely to be held unconstitutional after trial.[302] The district court believed that Proposition 209 would be held unconstitutional because its preference prohibition discriminated against women and minorities. By amending the state constitution to pro-

300. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1520-21 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

301. *See id*. at 1493-99.

302. *See id*. at 1499-510.

hibit race and gender preferences while permitting all other types of preferences—such as preferences based on age, disability, or veteran status—Proposition 209 impermissibly singled out race and gender for the imposition of special political burdens.[303] The district court found that after Proposition 209, proponents of race and gender preferences could advance their political interests only at the statewide level by amending the California Constitution, while proponents of all other preferences could advance their interests at any level of government through the ordinary political process.[304] Proposition 209 therefore restructured the California political process in a way that seemed to violate the Equal Protection Clause of the Fourteenth Amendment under *Hunter v. Erickson*[305] and *Washington v. Seattle School District No. 1*.[306] Unlike the court of appeals, which treated Proposition 209 as if it implicated distinct "conventional" and "political structure" equal protection issues,[307] the district court focused exclusively on whether Proposition 209 had impermissibly restructured the California political process.[308]

Doctrinally, the district court held first that Proposition 209 constituted a race- and gender-based classification,[309] and second that it restructured the political process in a way that could not survive heightened equal protection scrutiny.[310] On its face, the district court opinion seems more persuasive than the court of appeals opinion, because the district court is cautious and doctrinally meticulous where the court of appeals was more ideologically cavalier. Ultimately, however, both of the holdings of the district court rest on the assumption that Proposition 209 discriminates on the basis of race and gender. And like the neutrality assumption made by the court of ap-

303. *See id*. at 1499, 1504-06.

304. *See id*. at 1506-08.

305. 393 U.S. 385 (1969).

306. 458 U.S. 457 (1982). *See supra* notes 264-75 and accompanying text (discussing the *Hunter* and *Seattle* decisions).

307. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701, 702-03 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

308. *See Coalition for Econ. Equity*, 946 F. Supp. at 1499.

309. *See id*. at 1499-506.

310. *See id*. at 1506-10. For an academic version of the argument that Proposition 209 is unconstitutional because of its discriminatory restructuring of the political process, see Amar & Caminker, *supra* note 24, at 1041-45.

peals, the district court's discrimination assumption is difficult to defend on the basis of legal doctrine alone.[311]

1. *Race and Gender Classification*. As noted above, the district court held that the Proposition 209 preference prohibition constituted a race and gender classification because it prohibited race and gender preferences while permitting other types of preferences.[312] It is clear that Proposition 209 treats race and gender preferences differently than other preferences, but it is less clear that this differential treatment constitutes discrimination that is prohibited by the Equal Protection Clause. The district court conceded that the Proposition 209 preference prohibition does not contain a race or gender classification on its face.[313] Nevertheless, the district court believed that Proposition 209 constituted a race and gender classification under *Seattle* because of its race and gender focus. The court stated:

> The *Seattle* opinion sets out the framework for analysis: if an "initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests," it must be examined for

311. The district court's constitutional determinations were contingent rather than absolute because the district court was ruling on a motion for a preliminary injunction rather than issuing a final ruling on the merits. *See Coalition for Econ. Equity*, 946 F. Supp. at 1490-91 (discussing preliminary injunction posture of case before district court). The district court's final constitutional determinations would have been made after a trial on the merits if the decision of the court of appeals reversing the district court's grant of a preliminary injunction had not been written in terms so broad as to seemingly preclude the need for a trial. *See supra* note 246 (discussing breadth of court of appeals reversal).

Some commentators viewed efforts by the conservative court of appeals panel to expand its jurisdiction over the Proposition 209 case as politically motivated. *See supra* note 246 (discussing expansion of court of appeals jurisdiction). However, commentators have also suggested that the plaintiffs in *Coalition for Economic Equity* made strategic efforts to get their case assigned to a liberal district judge. *See, e.g.*, Ed Mendel, *State Voters Are Smacked by Slapstick Legal Antics*, COPLEY NEWS SERV., Feb. 23, 1997, *available in* LEXIS, Nexis Library, Curnws File. In addition, lawyers on both sides may have been "shopping" for sympathetic judges. *See* Golden, *supra* note 24, at A4; Dolan, *supra* note 24, at A1 (noting political liberalness of district court judge).

Like the court of appeals, the district court thought that the constitutionality of Proposition 209 could be determined in a broad facial challenge, and that abstention was not required to resolve the ambiguities raised by Proposition 209 as a matter of state law. *See Coalition for Econ. Equity*, 946 F. Supp. at 1492 n.8 (declining to abstain); *see also supra* Part I.B (discussing state law ambiguities concerning scope of Proposition 209).

312. *See Coalition for Econ. Equity*, 946 F. Supp. at 1499, 1505.

313. *See id.* at 1502 ("[T]he plain language of Proposition 209 . . . concededly contains no classification on its face . . . .").

> equal protection purposes as if it were a racial classification. Keeping the earlier discussion regarding the extension of this analysis to the gender context in mind, the Court applies the *Seattle* test to Proposition 209.[314]

Both the language and the outcome of the *Seattle* case support the district court conclusion that Proposition 209 constitutes a race and gender classification.[315] However, this language from the *Seattle* opinion was immediately qualified by the Supreme Court in *Crawford*, the case decided the same day as *Seattle*, that the court of appeals relied on in upholding Proposition 209.[316] In *Crawford*, the Supreme Court stated:

> Similarly, the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters. This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.[317]

Both the language and the outcome of *Crawford* support the court of appeals conclusion that Proposition 209 does not constitute a racial classification, but is merely a repeal of existing race and gender preferences that were not constitutionally compelled.[318] Accordingly, the district court's bare invocation of *Seattle* alone is not sufficient to establish which of the two precedents should be deemed controlling. Realizing this difficulty, the district court attempted to distinguish *Crawford* in order to establish that *Seattle* controlled the interpretation of Proposition 209.

According to the district court, the doctrinally material feature of Proposition 209 was not its mere repeal of existing race and gender preferences but rather its prohibition on the adoption of such prefer-

314. *Id*. at 1504 (citation omitted) (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982)).

315. *Seattle* invalidated a statewide initiative that effectively prohibited local school boards from using busing to facilitate school desegregation. *See supra* notes 267-68 and accompanying text (discussing *Seattle* case).

316. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 705 (9th Cir.) (quoting Crawford v. Board of Educ., 458 U.S. 527, 538 (1982)), *cert. denied*, 118 S. Ct. 397 (1997).

317. *Crawford*, 458 U.S. at 538 (footnote omitted).

318. *Crawford* upheld a California constitutional amendment that effectively precluded state courts from ordering busing to remedy de facto segregation. *See supra* notes 271-75 and accompanying text (discussing *Crawford* case).

ences in the future.[319] In that regard, Proposition 209 was like the busing initiative invalidated in *Seattle*, which prospectively prohibited local school boards from using busing to remedy de facto segregation. And it was distinguishable from *Crawford* because the California constitutional amendment upheld in *Crawford* merely repealed the authority of the courts to use busing programs to remedy de facto segregation; it did not preclude local school boards from adopting such busing programs in the future.[320] Therefore, Proposition 209 was unconstitutional because it was controlled by *Seattle* and was distinguishable from *Crawford*.

The problem with the district court's distinction is that it can be deconstructed to show that Proposition 209 is governed by *Crawford* rather than *Seattle*. According to a deconstructed version of the district court argument, the material feature of Proposition 209 is not its mere repeal of existing race and gender preferences but rather its prohibition on the adoption of such preferences in the future. In that regard, Proposition 209 is like the California constitutional amendment upheld in *Crawford*, which prospectively prohibited state courts from using busing as a remedy for de facto segregation. And it is distinguishable from *Seattle*, because the anti-busing initiative invalidated in *Seattle* merely repealed the authority of local school boards to use busing programs as a remedy for de facto segregation; it did not preclude state courts from adopting such busing programs in the future, when they deemed busing to be required. Therefore, Proposition 209 is constitutional because it is controlled by *Crawford* and it is distinguishable from *Seattle*.

The district court's efforts to apply *Seattle* and distinguish *Crawford* seems no more valid than does the above transposition of the two precedents. Each precedent contains both a repeal and a prospective prohibition. Supreme Court dicta notwithstanding,[321] the distinction between a mere repeal and a prospective prohibition cannot be the factor that accounts for the different outcomes in the two precedents.[322] This argument indicates that there is nothing in the precedents themselves that establishes whether Proposition 209 is discriminatory or neutral. And the district court offers no other

319. *See Coalition for Econ. Equity*, 946 F. Supp. at 1508.

320. *See id*. (distinguishing *Crawford*).

321. *See Crawford*, 458 U.S. at 538 (stating that mere repeal of legislation or policies relating to race is insufficient for finding of unconstitutionality).

322. *See infra* note 500 (discussing supposed distinction between repeal and prospective prohibition).

guidance in ascertaining which characterization of Proposition 209 is correct. The district court's decision to characterize Proposition 209 as discriminatory rather than neutral was undoubtedly motivated by the court's baseline assumption that the Proposition 209 elimination of race and gender preferences would perpetuate the lingering effects of past race and gender discrimination.[323] However, the district court did not explain why its baseline assumption of discrimination was preferable to the baseline assumption of neutrality that the court of appeals chose to make. Like the court of appeals, the district court failed to address the pivotal role of baseline assumptions in a sophisticated equal protection analysis of Proposition 209.[324]

The reason that proper characterization of Proposition 209 is so difficult is that Proposition 209 is both discriminatory and neutral. It is discriminatory in the way that it singles out race and gender preferences for special treatment, but its treatment of racial and gender preferences is neutral. How then is a court supposed to determine which characterization should prevail? *Crawford* initially seems to offer a solution. *Crawford* suggests that the Equal Protection Clause does not prohibit "state action that addresses, in neutral fashion, race-related matters."[325] Proposition 209 certainly addresses "race-related matters," but isn't its treatment of those matters "neutral," as the court of appeals insisted? On one level, this language merely reignites the dispute concerning the definition of neutrality in a context where different analysts come to the issue with different baseline assumptions. But it also presents a deeper doctrinal problem: *Loving v. Virginia*[326] seems to say that the Supreme Court's dicta in *Crawford* is wrong.[327]

323. *See Coalition for Econ. Equity*, 946 F. Supp. at 1495-99 (finding facts concerning effect that Proposition 209 would have on opportunities for women and minorities in public contracting, employment, education and political influence).

324. *See supra* notes 253-54 and accompanying text (discussing unexamined baseline assumption of neutrality made by court of appeals).

325. *Crawford*, 458 U.S. at 538.

326. 388 U.S. 1 (1967).

327. There is a technical difference between *Loving*, on the one hand, and *Crawford* on the other. As is discussed below, *see infra* note 328 and accompanying text, the miscegenation statute at issue in *Loving* made explicit reference to race, while the amendment at issue in *Crawford* never mentioned race at all. *See Crawford*, 458 U.S. at 537. However, it is difficult to attribute any doctrinal significance to this difference. If both enactments are neutral in the way that they treat race, it is unclear why it should matter for equal protection purposes whether the enactments explicitly mention race or not. And if both enactments are discriminatory, it is equally unclear why the presence or absence of an explicit reference to race should matter.

In *Loving*, the Supreme Court invalidated, on equal protection grounds, a Virginia criminal statute that prohibited racial intermarriage, even though the statute was racially neutral in its imposition of the miscegenation prohibition.[328] Merely singling out the *topics* of race and gender for special burdens relative to other topics seems to be enough under *Loving* to establish an equal protection violation, even if the special burdens are imposed neutrally within those topics. This reading of *Loving* suggests that the district court is right and the court of appeals is wrong, and that Proposition 209's treatment of race and gender preferences—even if neutral—is unconstitutionally discriminatory after all. But under this reading, *Loving* itself may well be wrong.

In *Loving*, the Supreme Court asserts that a racially neutral miscegenation statute would violate the Equal Protection Clause, but the Court never explains why.[329] Like the court of appeals opinion deeming the neutrality of Proposition 209 to be self-evident,[330] *Loving* treats the discriminatory nature of the miscegenation statute as if it were self-evident. In *Loving*, the Court found that the racial-integrity goal of the statute was "obviously an endorsement of the doctrine of White Supremacy."[331] In language reminiscent of the language used by the court of appeals to uphold the constitutionality of Proposition 209, the Supreme Court in *Loving* concluded, "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[332]

When assertions of self-evident correctness are substituted for doctrinal analysis, the conclusions that follow lack any principled justification. They have only the support of the intuitions that created

328. *See Loving*, 388 U.S. at 11-12. In fact, the Virginia statute that the Supreme Court invalidated was not racially neutral. It prohibited intermarriage with white people, but not intermarriage among racial minorities. Nevertheless, the Supreme Court stressed that even a miscegenation statute that applied neutrally to all races would fail to survive constitutional scrutiny under the Equal Protection Clause. *See id*. at 11-12 n.11.

329. *See id*. (discussing unconstitutionality of neutral miscegenation statutes).

330. *See supra* text accompanying note 247 (discussing court of appeals treatment of Proposition 209 as self-evidently neutral).

331. *Loving*, 388 U.S. at 7 (characterizing justification for miscegenation statute offered by Virginia Supreme Court of Appeals in *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955)); *see also id.* at 11 ("[T]he racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

332. *Id*. at 12; *cf.* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir.) ("As a matter of 'conventional' equal protection analysis, there is simply no doubt that Proposition 209 is constitutional."), *cert. denied*, 118 S. Ct. 397 (1997).

them, and those intuitions can be both transitory and fleeting. Nothing illustrates this phenomenon better than the history of the statute that *Loving* invalidated. Although the *Loving* Supreme Court found the Virginia miscegenation statute self-evidently to violate "the central meaning of the Equal Protection Clause," eleven years earlier the Supreme Court had declined to invalidate the very same statute in *Naim v. Naim*.[333] In *Naim*, the Supreme Court apparently had different intuitions about the constitutionality of miscegenation statutes in the more volatile post-*Brown* political climate.[334] Similarly, the intuitive correctness of affirmative action preferences that characterized the beginning of the civil rights movement is now being replaced by the intuitive skepticism about affirmative action. This skepticism underlies Proposition 209. The whole point of doctrinal analysis is that mere intuitions are too transitory to serve as a reliable foundation for constitutional analysis, but judicial analysis of Proposition 209 seems to be overwhelmingly intuitive.[335]

While *Loving* may lend precedential support to the district court characterization, it does not provide any analytical support for the district court view. And the district court does not point to any other analytical basis for characterizing Proposition 209 as discriminatory rather than neutral. The district court characterization of Proposition 209 as a race and gender classification is therefore analytically no more defensible than the court of appeals characterization of Proposition 209 as race- and gender-neutral. Nevertheless, even if one were to accept the district court characterization of Proposition 209 as a race and gender classification, it is still not clear that Proposition 209 restructures the political process in a way that violates the Equal Protection Clause.

2. *Political Restructuring.* The district court held that Proposition 209 violates the Equal Protection Clause by restructuring the California political process in a way that makes it harder for women

333. 350 U.S. 891, 891 (1955) (per curiam) (declining to rule on the validity of the Virginia statute and remanding for further proceedings due to factual questions that prevented the court from considering the issue in a "clean-cut and concrete form, unclouded" by such problems) and 350 U.S. 985, 985 (1956) (per curiam) (dismissing appeal for want of a properly presented federal question).

334. *See* SPANN, *supra* note 127, at 106-07 (discussing *Loving* and *Naim*).

335. *But see infra* Part III (suggesting that doctrinal indeterminacy ultimately leaves intuitive analysis as the only meaningful option for assessing the constitutionality of Proposition 209).

and minorities than it is for other interest groups to secure the political preferences that they desire.[336] The district court bolstered this holding with factual findings concerning the magnitude of the burden that Proposition 209 is likely to impose on women and minorities.[337] Even assuming the validity of these factual findings, and that Proposition 209 will have a differential impact on women and minorities, the district court argument still does not work. It is not so much that the court's argument is wrong, as that it relies on assumptions about the nature of a properly functioning political process that are not only difficult to defend, but are also ultimately self-consuming.

The essence of the political restructuring argument on which the district court relies is that consigning some issues exclusively to remote levels of the state political process while permitting other political issues to be resolved at local or remote levels is discriminatory. Such a structure engenders discrimination because it is typically more difficult to secure political victories at remote levels of the political process than at local levels. For example, it is more difficult to be elected President of the United States than mayor of the town you grew up in, and supermajority requirements make it more difficult to amend the Constitution than to secure the enactment of ordinary legislation.[338] When the issues consigned to the more demanding levels of the political process are issues in which women or minorities have a special interest, that discrimination violates the Constitution unless the state can justify its actions with reasons that are sufficient to satisfy heightened scrutiny under the Equal Protection Clause.[339]

In the case of Proposition 209, women and minorities won political concessions in the form of affirmative action preferences at the local political level from school boards, city councils, state agencies, courts, and even the state legislature.[340] Then Proposition 209 removed the affirmative action issue from the local political level, and

336. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1506-08 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

337. *See id*. at 1495-99, 1506-08.

338. Note that remote levels of the state political process need not always be the most politically demanding. Women and minorities living in a particularly discriminatory community within a generally nondiscriminatory state might find it easier to secure the adoption of statewide antidiscrimination measures than to secure the adoption of a local antidiscrimination ordinance.

339. *See Coalition for Econ. Equity*, 946 F. Supp. at 1508-10.

340. In this context, the term "local" means any political level below the state constitution, including the state legislature, administrative agencies and courts.

consigned it to the state constitutional level. By prospectively requiring a state constitutional amendment in order to secure a race or gender affirmative action preference, Proposition 209 made it politically very difficult for women and minorities to regain the political victories that they had secured as majorities at the local level.[341] Quoting the Supreme Court's recent decision in *Romer v. Evans*, the district court emphasized that "'[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection in the most literal sense.'"[342]

In order to make this argument work, the district court would have to offer some way of determining the level of the state political process at which each political issue should properly be resolved. However, it seems that there is no way in which such a determination could be made.[343] It cannot be that all issues must be resolved at the state constitutional level, for that would not only deny any legitimate role to the state and local legislative, administrative and judicial bodies as decentralized policymaking bodies, but it would also make the state Constitution read like a detailed tax code or a set of administrative regulations. Similarly, it cannot be that all decisions must be made at the local level, for that would not only deny any role to the state legislative, administrative and judicial bodies as centralized policymaking bodies, but it would also preclude the possibility of including any substantive rights in the state Constitution. Once the polar extremes are recognized to be unacceptable, the problem seems insurmountable. It is hard to see how one could decide which issues were properly local and which were properly statewide in nature.

The most obvious solution to this problem is to let the state political process itself decide which levels of the process are appropriate

341. *See Coalition for Econ. Equity*, 946 F. Supp. at 1510.

342. *Id.* (quoting Romer v. Evans, 116 S. Ct. 1620, 1628 (1996)).

343. One might argue that any issue can be resolved at any level of the political process as long as both sides of the issue are compelled to operate at the same level. But that cannot be right. Proponents of free speech are free to implement their preferences for fostering speech at the local political level, but proponents of censorship can implement their preferences for suppressing speech only at the constitutional level by repealing the First Amendment. Similarly, one might argue that any issue can be resolved at any level of the political process, but that race and gender issues cannot be restricted to one level when other comparable issues are allowed to be resolved at other levels. The problem with this argument is that it is difficult to know which issues are comparable. If the government can require proponents of censorship to operate at the constitutional level by repealing the First Amendment, why can the government not also make proponents of affirmative action operate at the constitutional level by repealing Proposition 209?

for which political issues. Local political bodies could exercise any policymaking jurisdiction that they desired unless state political bodies exercised their superior power to divest local bodies of policymaking jurisdiction. That way, the political "market" would determine the most efficient allocation of political issues over the various levels of the state political process. But that is exactly what the State of California did prior to the district court's determination that it had restructured its political process improperly. California first permitted local political authorities to formulate race- and gender-based affirmative action policies, but the California voters became dissatisfied with the policies that had been adopted by local authorities and chose to formulate a substitute affirmative action policy at the state constitutional level. The district court held that this political restructuring was constitutionally impermissible, but it never explained why the race and gender preference issue was an issue that had to be resolved at a local rather than a constitutional level of the state political process.

The district court's political structure analysis seems inconsistent on this point. The district court held that the Proposition 209 preference prohibition issue must be resolved at the local political level, but that the Proposition 209 antidiscrimination provision issue was properly resolved at the state constitutional level.[344] It is very difficult to see what feature of antidiscrimination provisions makes them properly the subject of state constitutional law and preference prohibitions properly the subject of local policymaking. Both deal with the same race and gender issues, and both adopt the same antidiscrimination goals as their stated objectives. Therefore, if the state is free to address discrimination at the constitutional level, it should be equally free to address preferences at that same level. While the district court believes that the Proposition 209 preference prohibition does

344. The district court opinion states:

> This argument [that fundamental issues regarding individual rights should be resolved by the state Constitution] has substantial merit with respect to Proposition 209's broad antidiscrimination provision—the general ban on invidious race and gender discrimination is certainly a matter of constitutional decisionmaking. As the Court has pointed out, however, it is Proposition 209's ban on preferences, not its general ban on discrimination, that is the focus of the instant suit. In this narrower context, defendants' argument falls short. Prior to the passage of Proposition 209, the discretion to adopt constitutionally-permissible race- and gender-conscious affirmative action programs was, as defendants' counsel conceded at oral argument, lodged with state and local government entities, not reserved at the constitutional level.

Coalition for Econ. Equity, 946 F. Supp. at 1507.

not advance its stated antidiscrimination goals, and that Proposition 209 is unconstitutionally discriminatory, those beliefs cannot justify the district court's distinction between the *levels* of the political process at which the discrimination and preference provisions must be addressed.

If the preference prohibition is discriminatory, it violates the Equal Protection Clause and cannot be implemented at *any* level of the California political process. And if it is not discriminatory, it is valid and may for that reason be implemented at any level of the political process. However, the level of the state political process at which the preference issue is addressed cannot be the *reason* for its validity or invalidity; if it could, local antidiscrimination laws would be unconstitutional under the district court's reasoning because antidiscrimination laws are properly addressed at the constitutional level. The district court might mean that antidiscrimination provisions are somehow special and that they can, therefore, be adopted at any level of government. But why would that not also be true of laws prohibiting race and gender preferences? After all, for proponents of Proposition 209, the prohibition on race and gender preferences *is* an antidiscrimination law, which was adopted at the constitutional level—precisely where the district court says that such provisions should be adopted. It seems that the district court's distinction between the Proposition 209 discrimination and preference prohibitions does more to weaken the district court's argument than it does to strengthen it.

It may be that the district court argument is more subtle than I have presented it to be. It may be that what the district court objects to is the decision by the California electorate to move the affirmative action preference issue to the state constitutional level after it was first resolved at the local level. It may be that political issues are not inherently local or constitutional, but that the *relocation* of an issue to a more demanding level of the political process if it was initially decided at a less demanding level is what constitutes an impermissible restructuring of the political process. Indeed, there is language in the district court opinion suggesting that the vote dilution implicit in such a relocation is what the court found to be constitutionally offensive about Proposition 209.[345] But that argument also fails to withstand

345. The district court opinion states:

> Once those who support race- and gender-conscious affirmative action prevail at one level of government, however, the Equal Protection Clause will not tolerate an effort by the vanquished parties to alter the rules of the game—solely with respect to this

analysis. As Justice Powell pointed out in his *Seattle* dissent, such a reading of the Equal Protection Clause would permit local policy-making bodies to preempt higher state authorities from ever changing—even via amendments to the state Constitution—the local resolution of a controversial issue whenever the local body was the first to address the issue. Such a radical restructuring of a state's internal sovereignty cannot be what the Equal Protection Clause was intended to accomplish.[346]

The district court's response to this contention is that the Equal Protection Clause does not prohibit a state authority from reversing a policy decision made by a local authority per se, but it *does* prohibit such a reversal from being made in a manner that is discriminatory.[347] Once again, however, the district court argument is internally inconsistent. If relocation of the race and gender preference issue to the constitutional level is the factor that makes Proposition 209 discriminatory, there will be *no* cases in which this relocation is not discriminatory, and the local preemption of higher state authority that Justice Powell fears will *always* be present. Alternatively, if there are cases in which political relocation of the preference issue is *not* discriminatory, then political relocation cannot be the factor that causes Proposition 209 to be discriminatory, and the district court has still not explained why Proposition 209 is unconstitutional.

There is an additional problem with the district court political structure argument that stems from its self-consuming nature. The district court seems to believe that a neutrally-structured political process will produce results that are constitutionally preferable to the results produced by a discriminatorily-structured political process. However, the very existence of Proposition 209 seems to belie that assumption. The district court views the pre-Proposition 209 political structure that permitted race and gender preferences as neutrally-structured and therefore constitutionally permissible under the Equal Protection Clause. However, that neutrally-structured political proc-

> single issue—so as to secure a reversal of fortunes. Plaintiffs have borne their burden of showing that Proposition 209, by removing authority over race-and gender-conscious affirmative action to "a new and remote" level of government, has precisely such an effect. Such a reordering of the political process is tantamount to vote dilution in the most literal sense: the relevant voting pool is effectively expanded until the prior victory is undone.

Id. at 1510.

346. *Cf.* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 494-95 (1982) (Powell, J., dissenting) (discussing consequences of *Seattle* decision).

347. *See Coalition for Econ. Equity*, 946 F. Supp. at 1510.

ess produced Proposition 209, which prohibits race and gender preferences. Why then is not Proposition 209 the valid product of a properly functioning political process?

Stated differently, all the voters of California had equal access to the state ballot initiative process prior to the adoption of Proposition 209. Proponents of Proposition 209 were able to take advantage of that process to constitutionalize their political preferences, while opponents of Proposition 209 were not. Indeed, proponents and opponents of Proposition 209 still have equal access to the ballot initiative process, and opponents can secure the repeal of Proposition 209 simply by amassing the same level of political support for their affirmative action agenda as proponents of Proposition 209 were able to amass for theirs. If there is some substantive reason that even a neutrally-structured political process cannot eliminate race and gender preferences, the district court has not disclosed what it is. And one cannot help but wonder why the district court chose to rely on a political structure defect if Proposition 209 runs afoul of some substantive prohibition. This analysis suggests that complex theoretical questions may surround the interaction of substantive and procedural goals in American constitutional law. But it does not suggest that Proposition 209 restructured the California political process in a way that violates the Equal Protection Clause of the United States Constitution. If the district court is correct that Proposition 209 violates the Equal Protection Clause, it has yet to explain in a convincing manner why such a violation exists.

Each of the arguments the district court offers ultimately rests on the court's belief that Proposition 209 discriminates on the basis of race and gender. This is true of the court's argument that Proposition 209 constitutes a race and gender classification, and it is true of the court's assertion that Proposition 209 restructures the political process in a way that discriminates against women and minorities. In arriving at these conclusions, the district court adopted an analytical baseline that took account of the lingering consequences of prior race and gender discrimination that the prospective neutrality requirement of Proposition 209 would perpetuate. But, like the court of appeals, the district court failed to justify its baseline as the appropriate one for equal protection analysis. As a result, the district court opinion, like the opinion of the court of appeals, seems more a reflection of political preferences than the product of doctrinal analysis.

The reason that neither the district court nor the court of appeals was able to articulate a doctrinally satisfying justification for the out-

come that each deemed appropriate is that equal protection doctrine itself is simply too indeterminate to produce a resolution of the constitutional issues raised by Proposition 209. It seems that a judge's only choice is to fall back on his own political preferences in order to give the Equal Protection Clause operative meaning. The language of the Equal Protection Clause is entirely unhelpful, because the clause insists on a concept of "equality" that is as likely to require race and gender preferences as it is to prohibit them. And because of this conceptual imprecision, the equal protection precedents that the lower courts applied proved similarly unable to provide much guidance in conducting the proper equal protection analysis. The doctrinal indeterminacy that frustrates principled application of the Equal Protection Clause to Proposition 209 suggests that the representative branches of government may be institutionally more competent than the unelected judiciary to resolve the current affirmative action dispute. However, the Supreme Court may be unwilling to relinquish its control over social policymaking concerning the issue of affirmative action.

III. JUDICIAL INTERVENTION

The existence of doctrinal indeterminacy surrounding a controversial social issue is a clue that the Supreme Court has a limited role to play in the resolution of that issue. Because the Supreme Court is structured to be politically insular rather than politically accountable, it lacks the institutional competence to resolve social policy disputes that rest primarily on political preference rather than doctrinal principle. The doctrinal indeterminacy that surrounds the proper application of the Equal Protection Clause to Proposition 209, therefore, suggests that the Supreme Court should defer to political resolution of the affirmative action debate. In the absence of an ascertainable principle to guide the exercise of its discretion, Supreme Court intervention into that debate not only poses the risk that judicial preferences will be improperly substituted for political preferences, but it also poses the risk that the Court will adversely affect the interests of the political minorities that the Court is typically called on to protect. The Supreme Court's historical reluctance to defer to political resolutions of contentious social disputes suggests, however, that the Court will continue to supervise the ongoing affirmative action dispute. Moreover, the Court's prior interventions in the political process to invalidate majoritarian affirmative action programs now seem to re-

quire the Court to invalidate Proposition 209 in order to prevent the Court itself from acting in a discriminatory manner. Although this outcome is less desirable than Supreme Court withdrawal from the affirmative action debate, it does prevent the Court's political intervention in that debate from becoming indefensibly one-sided.

If the Supreme Court is not willing to overrule its recent decisions invalidating politically-enacted affirmative action programs, consistency requires the Court to invalidate Proposition 209. This is because Proposition 209 is indistinguishable from the affirmative action programs that the Court has chosen to invalidate. Like traditional affirmative action programs, Proposition 209 redistributes societal resources on the basis of race and gender. And it does so for the purpose of altering the status quo in a way that will benefit white males. Proposition 209 is, therefore, an affirmative action program for white males, and it should be subject to the same constitutional standards that govern other affirmative action programs.

If the Court is unwilling to view Proposition 209 as simply an affirmative action program for white males, the Court should still view Proposition 209 as a race and gender classification under the intentional discrimination standard of *Washington v. Davis*.[348] This is because the passage of Proposition 209 was motivated more by a desire to divert resources from women and minorities than by a desire to promote race and gender equality. The political climate out of which Proposition 209 emerged, its potential to perpetuate existing allocations of social, economic and political power, its demographically polarized support, its relationship to other xenophobic political measures, and other factors all suggest that Proposition 209 is better understood as an effort by the majority to reserve societal resources for itself than as an effort to bring about an end to race and gender discrimination. This inference is sufficient to trigger heightened judicial scrutiny of Proposition 209 as a race and gender classification under the intentional discrimination test of *Washington v. Davis.*

Once heightened scrutiny is applied to Proposition 209, it is difficult to see how its constitutionality could properly be upheld since most governmental classifications fail to survive heightened scrutiny. Moreover, even if heightened scrutiny is not applied, the Supreme Court's recent decision in *Romer v. Evans*[349] suggests that the discriminatory animus embedded in Proposition 209 precludes the ballot

348. *See* 426 U.S. 229, 239-42 (1976).

349. 116 S. Ct. 1620 (1996).

initiative from satisfying even rational-basis scrutiny.[350] Accordingly, if the Supreme Court is not willing to withdraw from the affirmative action debate, it can at least remain consistent in that debate by invalidating Proposition 209.

The argument presented in Part III of this Article is intended to be intuitive rather than doctrinal in nature. I readily concede that cases such as *Washington v. Davis* and *Romer v. Evans* are doctrinally capable of producing outcomes different from the outcome that I ascribe to them. Indeed, I am committed to the view that the doctrinal effect of such decisions is largely indeterminate. However, the existence of doctrinal indeterminacy does not mean that all outcomes are equally up for grabs. Rather, doctrinal indeterminacy is merely an indication that one must look to something other than legal doctrine for normative guidance in distinguishing between good outcomes and bad ones. I do not claim to know precisely what those other sources of normative guidance may be. Nevertheless, I do have a strong intuitive sense that the Supreme Court would be behaving in an inconsistent manner if it were to uphold Proposition 209 after having invalidated affirmative action programs that were adopted through the political process. And I have a strong intuitive sense that Proposition 209 is the product of an intentional effort to discount the welfare of women and minorities because American culture considers women and minorities to be less deserving of societal resources than are white males. I cannot prove these intuitions in any syllogistic sense, but I believe that once the doctrinal distractions have been neutralized by exposing the ways in which doctrinal rules are so readily manipulated, others will come to share my intuitions about the discriminatory nature of Proposition 209. My hope is that readers will not ask themselves whether they can think of any counterarguments to rebut the arguments that I offer, but that readers will instead ask themselves whether the arguments that I offer seem correct. My goal is to get beyond the doctrine so that, with the doctrinal hiding places eliminated, we will be forced to confront the difference between right and wrong in assessing the constitutionality of Proposition 209.

350. *Cf. id.* at 1627 (holding that a provision of the Colorado Constitution which prohibited any protected status based on sexual orientation failed to satisfy rational-basis scrutiny since it appeared to be motivated by "animus toward the class it affects").

A. Institutional Competence

In a democracy, social policy is supposed to be made by the politically accountable representative branches of government, not by the politically insulated Supreme Court. The role of the judiciary is properly limited to the application of intelligible principles, which reduces the countermajoritarian danger that the Court will substitute its own policy preferences for the policy preferences of the electorate.[351] But where legal doctrine is indeterminate, there is no intelligible principle to constrain the exercise of judicial discretion and the countermajoritarian problem becomes particularly serious. When principled resolution of a social problem is difficult because of ambiguities inherent in governing principles, political resolution of that problem can at least claim the legitimacy accorded by the democratic process. Judicial resolution of such a problem, however, can claim no legitimacy at all.[352]

1. *Political Question*. As a formal matter, the Supreme Court has always recognized the limits on its institutional competence to resolve social problems that are more amenable to political than principled resolution. In *Marbury v. Madison*,[353] Chief Justice John Marshall emphasized that the Supreme Court could not properly supplant the discretion of one of the representative branches of government with respect to questions that are "in their nature political."[354] Marshall stressed that the Supreme Court was authorized to protect individual rights, but inherently political questions were "by the constitution and laws, submitted to the executive."[355] This dicta from *Marbury* has evolved into the contemporary political question doctrine, under which courts treat an issue as nonjusticiable if, *inter alia*, there is "a lack of judicially discoverable and manageable stan-

351. *See generally* BICKEL, *supra* note 12, at 16-23 (discussing limited competence of Supreme Court to make social policy).

352. One could, of course, question the assumption that democratic policymaking is desirable, or that the United States political process is, in fact, democratic. For present purposes, however, I am adopting an analytical baseline that accepts the validity of these assumptions, only because I believe that most people accept their validity.

353. 5 U.S. (1 Cranch) 137 (1803).

354. *See id.* at 169-70 (holding that mandamus is not available to compel discretionary actions by executive branch because of political nature of issue).

355. *Id.* (discussing deference to executive branch without discussing deference to larger political process).

dards for resolving it."[356] Although the political question doctrine is primarily directed at separation of powers concerns within the federal government,[357] under the doctrine of federalism its focus on the need for an intelligible principle to guide the exercise of judicial discretion should apply with equal force to Supreme Court review of political determinations made by state authorities.

As a matter of federal administrative law, the existence or nonexistence of an intelligible governing legal principle is one of the factors that determines whether judicial review of agency action has been precluded under the Administrative Procedure Act.[358] The Supreme Court has held that in the absence of such a standard, administrative "agency action is committed to agency discretion by law,"[359] underscoring the belief that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[360] Even when an issue is justiciable, or when judicial review has not been formally precluded, the standard of review that the Court typically applies is nonetheless deferential. In the administrative law context, the *Chevron* doctrine requires a reviewing court to defer to the policy preferences of an administrative agency unless a governing legal standard unambiguously precludes the agency's policy choice.[361]

Similar judicial deference is typically required under the Equal Protection Clause because the equal protection standard is not sufficiently precise to allow a reviewing court to second guess the policy determinations made by the representative branches in the normal range of cases.[362] The Court does apply nondeferential heightened

356. Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing factors that make an issue a nonjusticiable political question).

357. *See id*.

358. *See* Heckler v. Chaney, 470 U.S. 821, 823 (1985) (discussing preclusion of review in administrative agency context).

359. *Id.* at 828 (quoting Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1994)) (specifying statutory standard for preclusion of review).

360. *Id*. at 830.

361. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984) (stating that where the governing statute "is silent or ambiguous with respect to the specific issue," agency policy preferences concerning that issue "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

362. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) ("No matter how unwise it may be for [the Transit Authority] to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision."); *see also*

scrutiny where suspect classifications such as race and gender are implicated,[363] but when the absence of an intelligible principle makes it difficult to determine whether a classification discriminates on the basis of race or gender, the arguments that favor deferential review in the typical case again apply with full force. Even when an issue does seem to be governed by an ascertainable legal principle, presentation of that issue in a volatile political context has caused the Court to decline to adjudicate the issue because of the danger that intense political volatility will overwhelm legal doctrine, and thereby transform an issue of legal principle into an issue of political expediency. This is what happened the year after *Brown v. Board of Education* was decided, when the Supreme Court declined to apply the *Brown* principle to invalidate the Virginia miscegenation statute in *Naim v. Naim*.[364]

In both the administrative law and equal protection spheres, the Supreme Court has recognized the primacy of the directive that the Court is to apply legal principles and not to make political policy under the guise of judicial discretion. The distinction between proper application of legal principles and improper formulation of social policy suggests that the Supreme Court should withdraw from the political debate about affirmative action. The Court's affirmative action decisions have done little to promote political consensus on the issue of affirmative action. On the contrary, they have arguably upset the political consensus that existed during the formative stages of the civil rights movement concerning the situations in which affirmative action was an appropriate remedy for discrimination. Moreover, the history of Supreme Court involvement in the controversial issue of affirmative action suggests that the affirmative action issue has now become so politicized that it simply cannot be resolved through principled judicial decisionmaking. This claim is true in both empirical and theoretical terms.

As an empirical matter, the Court's attitude toward affirmative action has vacillated with the prevailing political climate. The Su-

STONE ET AL., *supra* note 128, at 570 (discussing lack of judicial competence to override means/ends determinations made by representative branches).

363. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (prescribing "most rigid" scrutiny for racial classifications); *The VMI Case*, 116 S. Ct. 2264, 2275 (1996) (requiring "exceedingly persuasive" justification for gender classifications).

364. *See supra* notes 333-34 and accompanying text (discussing *Naim*); *see generally* BICKEL, *supra* note 12, at 111-98 (discussing justiciability "passive virtues" that permit Supreme Court to avoid adjudication of legal issues that have become overly politicized).

preme Court first entered the affirmative action debate in 1974, when it declined to rule on the constitutionality of affirmative action, preferring instead to sidestep the issue on justiciability grounds.[365] In the twenty-three years that have elapsed since that time, the Supreme Court has considered twenty-two racial affirmative action cases raising constitutional or Title VII claims.[366] It has upheld the affirmative action plans at issue in some, invalidated the plans at issue in others, and resolved still others on justiciability grounds.[367] The Supreme Court's decisions throughout most of this period were fractured, with the Court resolving the cases in plurality rather than majority opinions.[368] The Court was not able to issue its first majority opinion in a constitutional affirmative action case until 1989.[369] Since then, most of its majority opinions have been five-to-four decisions.[370] Affirmative action case outcomes have largely depended on the Court's personnel at the time that a particular case was decided.[371] Supreme Court voting patterns have also been very polarized, with most Justices voting consistently in blocs that are divided along liberal and conservative political lines.[372] The Justices in the conservative bloc have virtually never voted in favor of affirmative action, and the Justices in the liberal bloc have virtually never voted against it.[373] Since 1993, a conservative five-Justice majority appointed by Presidents

365. *See* DeFunis v. Odegaard, 416 U.S. 312, 319-20 (1974) (per curiam).

366. *See* Spann, *supra* note 194, at 14-21 (discussing the eighteen Supreme Court affirmative action cases then decided that raised constitutional or Title VII claims). Since that article was written, the Supreme Court has decided four additional constitutional affirmative action cases, all in the voting rights context. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997); Abrams v. Johnson, 117 S. Ct. 1925 (1997); Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996). The Court has also decided three additional voting rights cases on statutory grounds. *See* City of Monroe v. United States, 118 S. Ct. 400 (1997); Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491 (1997); Young v. Fordice, 117 S. Ct. 1228 (1997).

367. *See* Spann, *supra* note 194, at 14-17 (discussing case outcomes).

368. *See id*. at 17 (discussing plurality decisions).

369. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (first majority opinion); *see also* Spann, *supra* note 194, at 17 n.84 (noting plurality opinions in affirmative action cases before *Croson*).

370. *See* Spann, *supra* note 194, at 17.

371. *See id*. at 21 (voting chart).

372. *See id*. at 18-20 (discussing Supreme Court voting blocs).

373. *See id*. at 18-21 (discussing consistency in voting patterns). *But see* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2189 (1997) (Chief Justice Rehnquist voting with liberal bloc to uphold Florida redistricting plan incorporated as part of district court consent decree). The plan at issue in *Lawyer*, however, arguably did not constitute "affirmative action" because it omitted the majority-black district at issue, and it did not trigger heightened scrutiny by treating race as the "predominant" districting factor. *See id.* at 2195.

Reagan and Bush has invalidated each of the affirmative action programs before the Court on constitutional grounds.[374] Because of this polarization, the Supreme Court's affirmative action cases to date have exhibited the properties of political plebiscites rather than principled adjudications.

As a theoretical matter, the affirmative action issue seems to defy all efforts at principled resolution. The abstract principle of equality is stated at too high a level of generality to be useful in resolving the debate about the constitutionality of affirmative action. The inadequacy of the equality principle is clearly illustrated by the analytical difficulties encountered in evaluating the opinions issued by the district court and the court of appeals in *Coalition for Economic Equity*.[375] The reasoning of each opinion followed logically from the tacit background assumptions on which each opinion was based, but neither opinion offered any principled reason to prefer its particular set of background assumptions to the assumptions made by the other. The district court assumption that lingering effects of past discrimination had to be considered in order to make an equality determination led naturally to the court's conclusion that Proposition 209's prohibition on race and gender preferences is discriminatory.[376] Likewise, the court of appeals assumption that lingering effects of past discrimination were too subtle to be considered in making an equality determination led naturally to its conclusion that Proposition 209's requirement of prospective race and gender neutrality is nondiscriminatory.[377] The problem is that there is no principled way to decide whether the present effects of past discrimination should or should not count in assessing the constitutionality of affirmative action. The intensity of the present affirmative action debate reveals that people have dramatically different normative views about the issue, but the abstract principle of equality says nothing about the issue's proper resolution. That doctrinal silence makes questions

374. *See* Spann, *supra* note 194, at 18, 21; *see also* Abrams v. Johnson, 117 S. Ct. 1925, 1937 (1997); Bush v. Vera, 116 S. Ct. 1941, 1949 (1996); Shaw v. Hunt, 116 S. Ct. 1894, 1904-05 (1996). These three recent cases are not included in the voting chart in Spann, *supra* note 194, at 21. *See also* STONE ET AL., *supra* note 128, at cii-ciii (chart showing Presidents who appointed particular justices). Justices O'Connor, Scalia, Kennedy and Thomas were Reagan-Bush appointees, and Chief Justice Rehnquist, who was appointed Associate Justice by President Nixon, was later appointed Chief Justice by President Reagan. *See id.* at cii-ciii. *But see supra* note 373 (noting Chief Justice Rehnquist's vote with liberal bloc in *Lawyer*).

375. *See supra* Part II.

376. *See supra* Part II.B.

377. *See supra* Part II.A.

about the desirability of affirmative action appropriate for democratic resolution in the political process, but not for Supreme Court resolution in the judicial process. The constitutionality of affirmative action is a classic political question in the functional sense in which the term was used by Chief Justice Marshall in *Marbury*.[378]

2. *Majoritarian Bias*. Supreme Court participation in the affirmative action debate is not only inappropriately political, but it is likely to be inappropriately biased as well. Although the prevailing representation-reinforcement theory of judicial review views the Supreme Court as the branch of government responsible for protecting the interests of women and racial minorities, whose discrete and insular status makes them likely to be underrepresented in the political process,[379] the Supreme Court has not historically served this function. I have argued elsewhere that, for systemic reasons, the Supreme Court is better understood as a veiled majoritarian institution than as a countermajoritarian institution.[380] This constitutional status means that when the Court is called upon to make social policy that implicates minority interests, it is more likely to sacrifice minority interests for the benefit of the majority than to protect minority interests from majoritarian exploitation. Once again, there are empirical and theoretical reasons to believe that this is the case.

378. It is sometimes argued that race-conscious affirmative action can never be justified because the long-term pernicious effects of reinforcing race-conscious modes of thought will always outweigh whatever benefits are hoped to flow from race-conscious affirmative action. *See, e.g.*, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 778 (1979) ("Race-based laws . . . have generally tended to yield by-products and side-effects . . . vastly more divisive and wretched than the benefits that were supposed to be forthcoming . . . ."); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227-31 (1995) (claiming that so-called benign racial classifications exacerbate racial prejudice); Amar & Caminker, *supra* note 24, at 1023-24 (commenting that some advocates of the "color-blind" approach to addressing racial problems believe that affirmative action programs "do more damage than they are worth"). Once again, however, the utilitarian balancing that such an assertion demands seems to be quintessentially political, because it will ultimately turn on the clash of normative preferences rather than the application of judicially manageable standards.

379. *See generally* ELY, *supra* note 280, at 181 (elaborating representation-reinforcement theory of judicial review).

380. *See generally* SPANN, *supra* note 127, at 19-35 (arguing that institutional features make Supreme Court more likely to protect majority interests than to protect interests of racial minorities). Although my characterization of the Supreme Court as a veiled majoritarian institution might initially seem inconsistent with my suggestion that Supreme Court intervention into the politics of affirmative action is undemocratic, I believe that the effect of Supreme Court decisions is often to provide more protection for majority interests than the majority has provided for itself through the ordinary political process. *See id*. at 130-36.

Empirically, the Supreme Court has a poor record of protecting minority interests. In fact, minorities have had more success protecting their interests in the political process than they have had before the Supreme Court.[381] For example, in *Prigg v. Pennsylvania*,[382] the Pennsylvania legislature protected the interests of blacks by enacting a statute that prohibited whites from bypassing state legal processes and using force or violence to kidnap and remove from the state blacks who were alleged to be escaped slaves.[383] The Supreme Court, however, invalidated the Pennsylvania statute on the grounds that it conflicted with federal constitutional and statutory provisions protecting the property rights of white slave owners.[384] The Supreme Court also invalidated, on constitutional grounds, the Missouri Compromise Act of 1820, which Congress enacted to limit the spread of slavery in the new federal Territories acquired through the Louisiana Purchase. In the infamous *Dred Scott v. Sandford*[385] decision, the Supreme Court held, in language by Chief Justice Taney, which has become noteworthy for its racially demeaning tone, that the subhuman character of blacks deprived them of the capacity to be citizens of the United States within the meaning of the diversity jurisdiction provision of the Constitution.[386] Despite the Court's holding that it lacked jurisdiction, the Court went on to hold that the Missouri Compromise effort to limit slavery in the Louisiana Territory was an unconstitutional interference with the property interests of slave owners.[387]

Dred Scott was politically overruled by the Civil War and the ensuing federal Reconstruction legislation and constitutional amendments adopted to protect the civil rights of newly-freed slaves. These Reconstruction measures included the Equal Protection Clause of

381. *See generally id.* at 89-99 (discussing minority successes in the political process and minority frustrations before the Supreme Court).

382. 41 U.S. (16 Pet.) 539 (1842).

383. *See id*. at 608.

384. *See id*. at 611, 613, 625-26 (invalidating Pennsylvania statute as conflicting with the Rendition Clause of the United States Constitution, U.S. CONST. art. IV, § 2, and congressionally enacted Fugitive Slave Act of 1793).

385. 60 U.S. (19 How.) 393 (1856).

386. *See id*. at 404-05, 407; *see also* SPANN, *supra* note 127, at 94-97 (discussing *Dred Scott* decision). Although one of my colleagues always insists that I point out that Chief Justice Taney purports to be describing the views of the framers when he offers his demeaning depiction of blacks, it is difficult to read Chief Justice Taney's language and not have the firm conviction that the views he is expressing are his own.

387. *See id*. at 451-52.

the Fourteenth Amendment.[388] However, the Supreme Court invalidated some Reconstruction measures,[389] limited the scope of others[390] and imposed a state-action limitation on the Fourteenth Amendment that was designed to place private discrimination beyond the reach of congressional remedial power.[391] Once Reconstruction had lost its political momentum, the Supreme Court held, in *Plessy v. Ferguson*,[392] that the Equal Protection Clause of the Fourteenth Amendment was satisfied by separate-but-equal treatment, thereby permitting states to engage in official racial segregation without violating the Constitution.[393] The Supreme Court overruled *Plessy* in *Brown v. Board of Education*,[394] but *Brown* is also problematic.

Brown is typically pointed to as the case that established the Supreme Court's countermajoritarian capacity to protect minority rights in the face of massive political opposition. *Brown* is said to have both desegregated the public schools and to have invalidated the general use of racial classifications by government actors.[395] In reality, however, *Brown* did neither of those things.[396] As a result of Supreme Court decisions upholding the constitutionality of de facto segregation,[397] and precluding interdistrict remedies for de jure segregation,[398] many public schools are still badly segregated. Sixty-six percent of all black students nationwide attend schools that have predominantly minority enrollments; more than half of these stu-

388. *See* SPANN, *supra* note 127, at 41-50, 97 (discussing Reconstruction amendments and statutes).

389. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 8-19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875).

390. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70-83 (1872) (limiting reach of Reconstruction amendments and holding that the Fourteenth Amendment did not shift general responsibility for protecting civil rights from state to federal governments).

391. *See The Civil Rights Cases*, 109 U.S. at 8-19 (imposing state-action requirement).

392. 163 U.S. 537 (1896).

393. *See id.* at 544-52.

394. *See Brown I*, 347 U.S. 483 (1954).

395. *See* SPANN, *supra* note 127, at 104-06 (discussing common understanding of *Brown*).

396. *See generally id.* at 104-10 (discussing difficulties with common understanding of *Brown*).

397. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 198-205, 208-09 (1973) (adopting de jure rather than de facto test for unconstitutional school segregation); *see also* SPANN, *supra* note 127, at 73-80 (discussing school desegregation cases).

398. *See* Milliken v. Bradley, 418 U.S. 717, 744-47 (1974) (limiting desegregation to districts guilty of de jure segregation); *see also* SPANN, *supra* note 127, at 73-80 (discussing de jure versus de facto school desegregation cases).

dents attend virtually all-black schools.[399] The Supreme Court has reconciled this outcome with the desegregation command of *Brown* by holding that a public school that was once officially segregated can now become formally desegregated even though the composition of its student body remains all-black.[400] As a result, the *Brown* desegregation requirement can now be satisfied by the very separate-but-equal schools that *Plessy* permitted—except that the Supreme Court's constitutional authorization of unequal public school funding[401] means that the racially separate schools need no longer be "equal," as they were nominally required to be under *Plessy*.[402]

Brown also failed to end governmental use of racial classifications. Explicit governmental use of racial classifications is now common in matters as ubiquitous as the census,[403] adoption standards,[404]

399. *See* STONE ET AL., *supra* note 128, at 558-59 (discussing current levels of school desegregation).

400. *See* Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (holding that an improvement in the quality of education was a sufficient remedy to previous de jure segregation despite the persistence of an overwhelmingly black enrollment); *see also* Spann, *supra* note 194, at 54-57 (discussing *Missouri v. Jenkins*).

401. *See* San Antonio Indep. Sch. Dist. v Rodriguez, 411 U.S. 1, 11-17, 54-55 (1973) (upholding racially disparate property-tax based funding of public schools).

402. *See* SPANN, *supra* note 127, at 108-09; Spann, *supra* note 194, at 57. Both discuss the Supreme Court's tacit revival of the *Plessy* segregation doctrine, without the equality requirement of *Plessy*.

403. For discussions of the controversy surrounding the proposal to include a new multiracial category in the census compilation for year 2000, see Nancy A. Denton, *Our Private Obsession, Our Public Sin: Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?*, 15 LAW & INEQ. J. 83 (1997); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7 (1997); *see also* Steven A. Holmes, *Panel Balks at Multiracial Census Category*, N.Y. TIMES, July 9, 1997, at A12 (reporting that federal task force representing 30 agencies recommended rejection of proposal to add multiracial category to census, but recommending that individuals be permitted to check more than one of four existing racial categories); *cf.* Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156, 158 (E.D. Va.) (upholding under apparent rational-basis scrutiny, Virginia statute requiring compilation in racial categories of public divorce records but invalidating racial compilation of voting and property records), *aff'd sub nom.* Tancil v. Woolls, 379 U.S. 19 (1964).

404. *See, e.g.*, R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (emphasizing that public adoption agencies routinely classify children by race in order to facilitate preferences of adoptive parents); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1183-1200 (1991) (discussing laws and policies employing racial criteria for adoption); David S. Rosettenstein, *Trans-racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot,"* 68 ST. JOHN'S L. REV. 137, 139-40, 145-49 (1994) (same); *see also* Catherine M. Brooks, *The Indian Child Welfare Act In Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L.

drug profiles,[405] and immigration stops,[406] and Supreme Court dicta have suggested that racial segregation of inmates could be used to prevent prison disorders.[407] Laws that provide for special treatment of Native Americans also constitute explicit racial classifications that are routinely upheld.[408] In addition, the Supreme Court has interpreted the Voting Rights Act of 1965 to permit race and ethnicity to

REV. 661, 679-80 (1994) (discussing the preference expressed in the Indian Child Welfare Act for adoption of Native American children by Native American families); *cf.* Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding that Equal Protection Clause prohibits divesting mother of child custody because of mother's remarriage to man of different race); *Recent Legislation: Transracial Adoption—Congress Forbids Use of Race as a Factor in Adoptive Placement Decisions—Small Business Jobs Protection Act, Pub. L. No. 104-188, § 1808 (1996)*, 110 HARV. L. REV. 1352, 1352-57 (1997) (discussing likelihood that race will continue to be used as factor in adoption placements despite federal legislation, codified at 42 U.S.C.A. § 671(a)(18) (West Supp. 1997), prohibiting use of race as dispositive factor).

405. *See, e.g.*, United States v. Ceballos, 654 F.2d 177, 185-86 (2d Cir. 1981) (holding that reliance on Latino appearance by Drug Enforcement Agency drug courier profile is adequate for further investigation in limited airport stop, but is not adequate to establish reasonable suspicion or probable cause); *id.* at 187 (Meskill, J., dissenting) (arguing Latino appearance was "an appropriate factor to consider" in drug courier profile); *see also* United States v. Ornelas-Ledesma, 16 F.3d 714, 717, 719 (7th Cir. 1994) (holding that use of "'drug courier profile' that seems only a little better than a dragnet for Hispanics" may be used with other factors to establish reasonable suspicion for investigative stop); United States v. Taylor, 956 F.2d 572, 582-83 (6th Cir. 1992) (Keith, J., dissenting) (objecting to Drug Enforcement Agency use of "generic drug courier profile that openly targets African-Americans").

406. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976) (upholding use of racial factors in making selective stops at immigration checkpoints); *cf.* United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975) (holding that Mexican appearance is relevant factor in roving INS border patrol stops, but cannot be sole factor).

407. *See* Lee v. Washington, 390 U.S. 333, 334 (1967) (Black, J., concurring, joined by Harlan and Stewart, JJ.) ("[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.").

408. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 553-55 (1974) (upholding Indian Reorganization Act employment preference for Native Americans hired by Bureau of Indian Affairs); *id.* at 548 (describing Native American preference in government programs to train teachers of Native American children); *id.* at 552-53 (noting that Title 25 of United States Code contains many special preferences for Native Americans that are constitutionally valid); Morton v. Ruiz, 415 U.S. 199, 237-38 (1974) (upholding federal welfare benefits for Native Americans living on or near reservations); Williams v. Lee, 358 U.S. 217, 223 (1959) (upholding Native American tribal court jurisdiction over reservation affairs); Board of County Comm'rs v. Seber, 318 U.S. 705, 718 (1943) (upholding federally-granted tax immunity for Native Americans). Surprisingly, the Supreme Court has announced that federally recognized Native American tribes constitute a political group rather than a racial group. *See Morton*, 417 U.S. at 553 n.24. *See generally* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 760-61 (1991) (discussing the special legal treatment of Native Americans and the Supreme Court's determination that the category "Indian" and tribal subcategories are political, not racial, categories).

be taken into account in formulating legislative redistricting plans.[409] However, the Court has not been racially neutral in authorizing the consideration of these factors under the Voting Rights Act. The Court has permitted ethnicity to be used to create white voting districts in which particular ethnic groups are concentrated to produce a voting majority.[410] But it has invalidated redistricting plans that use race as the "predominant motive" in their efforts to increase minority voting strength by creating majority-minority districts.[411] This is not to say that the Supreme Court never invalidates racial classifications that harm minorities. In recent years, however, the Court's invalidations of racial classifications have tended to come in affirmative action cases, where the Court has invalidated racial affirmative action programs in order to advance the interests of the white majority.[412]

409. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194-95 (1997) (holding that legislators can consider race when drawing voting district lines); Miller v. Johnson, 515 U.S. 900, 916 (1995) (same); Shaw v. Reno, 509 U.S. 630, 646 (1993) (same); *Miller*, 515 U.S. at 928-29 (O'Connor, J., concurring) (noting that *Miller* and *Shaw v. Reno* did not invalidate "vast majority of Nation's 435 congressional districts," even though race may have been taken into account in creating them); *see also* United Jewish Orgs. v. Cary, 430 U.S. 144, 155-62 (1977) (plurality opinion of White, J.) (upholding use of race-conscious districting under Voting Rights Act of 1965); *cf. Miller*, 515 U.S. at 945-47 (Ginsburg, J., dissenting) (arguing that majority black districts should not be treated differently from districts that have been recognized as valid even though they group Irish or Italian voters together). *But see id.* at 914-15 (suggesting that *United Jewish Organizations* and *Miller* are distinguishable because *United Jewish Organizations* involved vote dilution while *Miller* involved voter separation).

410. *See Miller*, 515 U.S. at 947 (Ginsburg, J., dissenting) (noting that Court has not invalidated districts grouping Irish or Italian voters together).

411. *See* Abrams v. Johnson, 117 S. Ct. 1925, 1936 (1997); *see also* Bush v. Vera, 116 S. Ct. 1941, 1951-52 (1996) (plurality opinion of O'Connor, J.) (holding that race cannot be the predominant factor in districting decisions); Shaw v. Hunt, 116 S. Ct. 1894, 1900-01 (1996) (same); *Miller*, 515 U.S. at 915-17 (same); *cf. Lawyer*, 117 S. Ct. at 2194-95 (upholding, under rational-basis scrutiny, use of race as factor that did not predominate over traditional districting principles in consent decree that omitted disputed majority-minority district).

412. *See, e.g.*, *Bush*, 116 S. Ct. at 1952 (invalidating majority-minority voting districts adopted by state legislatures); *Shaw*, 116 S. Ct. at 1901 (same); *Miller*, 515 U.S. at 915-17 (same); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235-37 (1995) (requiring application of strict scrutiny to congressionally-adopted minority construction preference and therefore apparently invalidating preference); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (invalidating minority construction set-aside adopted by city council); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (invalidating layoff preference for minority teachers adopted by board of education as part of a collective bargaining agreement). *But cf. Lawyer*, 117 S. Ct. at 2194-95 (upholding, under rational-basis scrutiny, constitutionality of voter redistricting plan that used race as factor, where race did not predominate over traditional districting principles and plan was part of consent decree that omitted disputed majority-minority district); *Abrams*, 117 S. Ct. at 1930 (upholding districting plan adopted by court that substituted one majority-minority district for three majority-minority districts contained in a plan adopted by state legislature).

In the post-*Brown* era, racial minorities have continued to fare better in the majoritarian political process than they have before the supposedly countermajoritarian Supreme Court. Most of the school desegregation that has occurred since *Brown* has occurred as a result of guidelines developed by the United States Department of Health, Education and Welfare to implement the fund cutoff provisions for segregated schools required by Title VI of the Civil Rights Act of 1964.[413] Most desegregation in federal contracting occurred as a result of a Presidential Executive Order imposing affirmative action obligations on federal contractors.[414] Many of the affirmative action programs invalidated by the Supreme Court were programs that had been adopted by the majoritarian political process.[415] Moreover, the majority-minority voting districts that the Supreme Court has recently become committed to invalidating were created by state legislatures, at the urging of the United States Attorney General, in order to comply with the congressionally-enacted Voting Rights Act of 1965.[416] In recent times, racial minorities have had some success protecting their interests before the political process, but have often had their political victories nullified by the Supreme Court—just as the Supreme Court nullified minority political victories during the eras of *Dred Scott* and Reconstruction. In both the past and the present, the political process has been a better friend to racial minorities than the Supreme Court has been.

Women have also fared better under the political process than before the Supreme Court. After the Supreme Court declined to give women the right to vote,[417] women obtained suffrage through the adoption of the Nineteenth Amendment.[418] Although the Reconstruction-era Fourteenth Amendment guaranteed equal protection,

413. *See* SPANN, *supra* note 127, at 98 (discussing political forces producing school desegregation).

414. *See id.* (discussing political forces that increased minority participation in federal construction).

415. *See, e.g.*, *Adarand*, 515 U.S. at 235-39 (seemingly invalidating, under strict scrutiny, congressional statute containing minority construction preference); *Croson*, 488 U.S. at 469 (invalidating municipal ordinance containing minority construction set-aside); *cf. Wygant*, 476 U.S. at 267 (1986) (invalidating layoff preference for minority teachers adopted by school board as part of collective bargaining agreement).

416. *See, e.g.*, *Bush*, 116 S. Ct. at 1950-51 (invalidating majority-minority voting districts adopted by state legislatures to comply with Attorney General's interpretation of Voting Rights Act of 1965); *Shaw*, 116 S. Ct. at 1899 (same); *Miller*, 515 U.S. at 927-28 (same).

417. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874).

418. *See* U.S. CONST. amend. XIX (granting women right to vote).

the Court seemed wholly unconcerned with gender discrimination until 1971, when it first invalidated a gender classification on constitutional grounds.[419] The Court's lack of concern for the rights of women often went beyond mere neglect. In *Bradwell v. Illinois*,[420] when the Supreme Court denied women the right to practice law, a concurring opinion by Justice Bradley described the natural state of women as dependent adjuncts to their husbands, using language so demeaning that it rivals the language used by Chief Justice Taney to describe blacks in *Dred Scott*.[421] Because most gender-based discrimination against women is often rooted in stereotypes about appropriate societal roles for women,[422] Supreme Court reinforcement of those stereotypes is likely to be particularly counterproductive.

In modern times, the Court has continued to reinforce gender stereotypes by upholding statutory rape statutes as a means of reducing teenage pregnancies, in the apparent belief that underage women do not have the same capacity as underage men to consent to sexual intercourse.[423] The Court has also upheld the constitutionality of a congressional statute that requires men but not women to register for the draft, on the assumption that women are not as well-suited as men for military combat.[424] On occasion, the Supreme Court has upheld affirmative action programs for women on the grounds that

419. *See* Reed v. Reed, 404 U.S. 71, 77 (1971) (invalidating gender-based preference for decedent's estate administrators); *see also* STONE ET AL., *supra* note 128, at 697-99 (discussing early gender discrimination cases).

420. 83 U.S. (16 Wall.) 130 (1873).

421. *See id*. at 141 (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."); *cf.* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) ("[Blacks] had . . . been regarded as beings of an inferior order, . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit").

422. *See* Craig v. Boren, 429 U.S. 190, 198-99 (1976) (discussing need to avoid "'archaic and overbroad' generalizations" about women (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975))); *see also* STONE ET AL., *supra* note 128, at 721-30 (discussing gender stereotypes as basis for discrimination against women).

423. *See* Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 470 (1981) (upholding statute defining statutory rape as "an act of sexual intercourse accomplished with a female . . . under the age of 18 years").

424. *See* Rostker v. Goldberg, 453 U.S. 57, 79 (1981) ("The fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.").

women are not as able as men to achieve in the military,[425] or that women are less able than men to support themselves financially.[426] Sometimes the Supreme Court's solicitude for women has been characterized as protective in nature, although it has actually treated women as less than full citizens, or placed women at a competitive disadvantage in the job market.[427] And sometimes the Supreme Court's refusal to protect the interests of women has seemed artificially strained, as when the Court permitted the exclusion of pregnancy from disability insurance coverage on the grounds that the exclusion discriminated on the basis of a medical condition rather than on the basis of gender.[428] With the recent exception of *The VMI Case*,[429] which invalidated the Virginia Military Institute's practice of refusing to admit women,[430] the Court has not actively made use of the Constitution to guard against gender discrimination.[431]

Although women were not successful in securing adoption of an Equal Rights Amendment to the Constitution, which would have subjected gender classifications to strict scrutiny,[432] women have had notable political successes. While the Supreme Court was electing to give gender classifications only the protection of intermediate scrutiny under the Equal Protection Clause, rather than the full protection of strict scrutiny accorded other suspect classifications,[433] women

425. *See Schlesinger*, 419 U.S. at 508 (1975) (upholding federal statute giving women more time than men to make rank in Navy).

426. *See* Califano v. Webster, 430 U.S. 313, 316 (1977) (upholding federal statute effectively giving women higher social security benefits than men).

427. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 69 (1961) (giving women automatic exclusion from jury duty); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding restriction on women working as bartenders); Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding maximum-hours restriction on women working in factories).

428. *See* Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (holding that the exclusion of pregnancy from disability insurance coverage does not violate the Equal Protection Clause); *cf.* General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976) (holding that exclusion of pregnancy disability coverage did not violate Title VII prohibition on employment discrimination). *But see* Pregnancy Disability Act, 42 U.S.C. § 2000e(k) (1994) (rejecting *Gilbert* for statutory purposes and defining sex discrimination under Title VII to include discrimination based on pregnancy).

429. *The VMI Case*, 116 S. Ct. 2264 (1996).

430. *See id.* at 2269.

431. *See* STONE ET AL., *supra* note 128, at 742.

432. *See id.* (describing fate of proposed Equal Rights Amendment).

433. *Compare* Craig v. Boren, 429 U.S. 190, 197 (1976) (according gender classifications intermediate equal protection scrutiny), *with* Korematsu v. United States, 323 U.S. 214, 216 (1944) (prescribing strict scrutiny for racial classifications). However, the Court may have recently heightened the standard of scrutiny for gender classifications. *See The VMI Case*, 116 S.

successfully added gender to the list of categories for which employment discrimination is prohibited under Title VII of the Civil Rights Act of 1964.[434] The Supreme Court did dilute this political victory by interpreting Title VII to permit, rather than to prohibit, discrimination based on pregnancy, but women successfully had the Supreme Court's ruling legislatively reversed.[435] Title IX of the Civil Rights Act of 1964,[436] which has been especially significant in efforts to equalize athletic opportunities for women students,[437] prohibits gender discrimination in schools receiving federal funds.[438] Primary enforcement of this restriction is political, rather than judicial, coming from federal agency monitoring of nondiscrimination as a condition on the continued receipt of funding.[439] Women have also been successful in securing political adoption of affirmative action programs. For example, the federal minority construction preference program that the Supreme Court subjected to strict scrutiny and likely invalidation on racial grounds in *Adarand Constructors, Inc. v. Pena*[440] also contained a gender preference provision.[441] However, the continuing validity of such gender affirmative action preferences is uncertain, because we do not yet know whether the Supreme Court will invalidate gender affirmative action programs under the more deferential intermediate scrutiny applied to gender as it has invalidated racial af-

Ct. at 2275 (requiring "exceedingly persuasive" justification for gender classifications (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

434. See 42 U.S.C. § 2000e-2 (1994). Ironically, the addition of gender to the list of prohibited forms of discrimination under Title VII came as a result of a political miscalculation by opponents of Title VII who believed that the addition of a prohibition on gender discrimination would cause the bill to be so politically unpopular that it would be defeated. *See* Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1218-19 (1995) (discussing history of Civil Rights Act of 1964).

435. *See supra* note 428 and accompanying text.

436. 20 U.S.C. § 1681 (1994).

437. *See* Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 773-82 (1996) (discussing effects of Title IX); Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1627 (1997) (discussing feminist theory and effect of Title IX on women's sports).

438. 20 U.S.C. § 1681(a) (1994).

439. *See* Shook, *supra* note 437, at 773-74.

440. 515 U.S. 200 (1995).

441. *See id.* at 208 (stating that women are included within category of "socially and economically disadvantaged individuals" entitled to construction contract preference (quoting Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, 146)).

firmative action programs under the more demanding strict scrutiny applied to race.[442]

In addition to the Supreme Court's empirical failures to protect the interests of women and racial minorities, theoretical reasons give rise skepticism about the Court's ability to protect such interests. As Alexander Hamilton emphasized in *The Federalist No. 78*, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[443] When the governing doctrinal rules are indeterminate, the danger of "an arbitrary discretion in the courts" becomes very real. Doctrinal indeterminacy precludes the Supreme Court from having any productive role to play in the ongoing affirmative action debate, because doctrinal indeterminacy deprives the Court of its capacity to behave in a countermajoritarian manner. If a doctrinal rule prescribes the outcome of a legal dispute, the Supreme Court can simply apply that doctrinal rule without regard to majoritarian preferences and generate the result that the doctrine requires. However, when a governing doctrinal rule is indeterminate, the Supreme Court must engage in an act of doctrinally-unconstrained judicial discretion in order to resolve the dispute. This unconstrained discretion bodes ill for the interests of minorities and women. Because the Supreme Court is statistically more representative of the demographic majority than of racial minorities and women, the Court is statistically more likely to exercise its unconstrained discretion in ways that advance majority interests than it is to advance the interests of women and minorities.[444] The political preferences of the Justices are likely to be the same as the political preferences of the majority, and different than the preferences of women and racial minorities. Moreover, to the extent that majoritarian tendencies to discount the interests of

442. *See id*. at 246 (Stevens, J., dissenting) (noting that current law makes it easier for government to adopt gender-based affirmative action programs than race-based affirmative action programs, even though primary purpose of the Equal Protection Clause of the Fourteenth Amendment was to end racial discrimination against former slaves).

443. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton J. Rossiter ed., 1961).

444. My use of the term "majority" in this context encompasses the interests of whites and males, and disregards the fact that women constitute a numerical majority of the population. This use of the term makes sense because Proposition 209 benefits whites and males by prohibiting preferences for women and racial minorities, and because the Supreme Court has accorded special judicial protection to women and racial minorities, who have historically been disadvantaged in the majoritarian political process.

women and minorities are unconscious rather than deliberate,[445] there is no way that a Justice can consciously guard against such discounting when exercising judicial discretion.[446] The amorphous doctrinal standard of "equal protection" is too indeterminate to constrain the Court's discretion in resolving constitutional disputes about affirmative action in general, or Proposition 209 in particular, and it invites precisely this kind of discounting.[447] As a result, the Supreme Court should withdraw from the cultural debate about affirmative action and permit the undistorted political process to resolve the debate without judicial intervention that artificially skews the debate in favor of the majority and against the interests of women and minorities.

Unfortunately, the Supreme Court is unlikely to withdraw from the affirmative action debate. Institutions, like individuals, are rarely anxious to relinquish power. Indeed, the Framers counted on the predictable phenomenon of institutional jealousy as part of the separation-of-powers strategy that they adopted to check the excessive accumulation of power in one branch of the national government. They believed that "[a]mbition must be made to counteract ambition," in a way that would serve as a system of checks and balances adequate to prevent abuses of governmental power.[448] However, the Framers did not count on the exercise of judicial discretion for the formulation of social policy. They assumed that the limited role of the judiciary in applying legal principles would make the judiciary "the least dangerous" branch of government.[449] Nevertheless, the Supreme Court has historically shown a consistent inclination to seize control over the formulation of social policy that affects women and racial minorities.

In 1973, the Supreme Court intervened in the political debate about abortion, announcing in *Roe v. Wade*[450] that women possessed a constitutional right to obtain abortions.[451] The Court intervened even though there was no particular reason to believe that the political

445. *See supra* Part I.C.4 (discussing unconscious nature of much discrimination).

446. For a fully developed version of this argument see SPANN, *supra* note 127, at 19-26 (discussing veiled majoritarian conception of Supreme Court).

447. *See supra* Part II (discussing doctrinal indeterminacy concerning constitutionality of Proposition 209).

448. THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton J. Rossiter ed., 1961) (discussing separation of powers and checks and balances).

449. THE FEDERALIST NO. 78, *supra* note 443, at 465.

450. 410 U.S. 113 (1973).

451. *See id*. at 164-66 (finding trimester-based constitutional right to abortion).

process lacked the ability to resolve the abortion debate in a satisfactory manner. In the absence of *Roe*, the political process would probably have caused abortion to become freely available in some states, somewhat restricted in others, and highly restricted in yet other states—much as it is now. Although Supreme Court constitutionalization of the abortion issue took it out of ordinary politics, judicial resolution of the abortion issue does not seem to have been more stable or satisfying than political resolution would have been. The content of the constitutional right to abortion has waxed and waned with political shifts in Presidential administrations and ensuing Supreme Court appointments, and no one seems very satisfied with the Court's resolution of the issue.[452] Although the Court recognized a constitutional right to abortion, it never recognized a right to abortion funding.[453] As a result, indigent women who suffered the most serious hardships prior to *Roe* continued to suffer similar hardships after *Roe* was handed down.[454]

The Court's current position on abortion has not improved matters. In *Planned Parenthood v. Casey*,[455] the Court reaffirmed the existence of a constitutional right to abortion,[456] but made that right subject to an "undue burden" balancing test[457] that makes the constitutionality of particular restrictions on the right a function of what five members of the Supreme Court happen to think about the policy desirability of those restrictions. This balancing approach hardly exemplifies the constrained judicial discretion that Hamilton envisioned in *The Federalist No. 78*.[458] Some have even argued that the very reason the abortion issue presently remains so politically contentious is that Supreme Court constitutionalization of the issue has precluded a

452. *See* STONE ET AL., *supra* note 128, at 962-90 (discussing post-*Roe* Supreme Court abortion decisions).

453. *See* Harris v McRae, 448 U.S. 297, 326-27 (1980) (upholding federal "Hyde Amendment," which denied Medicaid coverage to recipients of therapeutic abortions where the mother's life was not threatened); Maher v. Roe, 432 U.S. 464, 479-80 (1977) (upholding state exclusion of nontherapeutic abortions from Medicaid coverage).

454. *See generally* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 243-44 (1985) (discussing hardships imposed on indigent women by abortion funding cases); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 377, 383-85 (1985) (commenting on the plight of women who wish to have abortions but cannot afford them).

455. 505 U.S. 833 (1992).

456. *See id.* at 870.

457. *See id*. at 878.

458. *See supra* note 443 and accompanying text (discussing Hamilton's recognition of need for constraints on judicial discretion).

stable political equilibrium from developing; instead, *Roe v. Wade* provided an issue around which conservative political sentiment could coalesce, and mobilized a political movement that might not otherwise have made the abortion issue so politically volatile.[459] Supreme Court intervention has not made the resolution of the abortion issue less political, but has merely made the politics of abortion less accountable.

The history of Supreme Court intervention in the politics of race has produced similar consequences. Prior to the Civil War, when the State of Pennsylvania tried to legislate a political compromise on the controversial issue of slavery, the Supreme Court invalidated the compromise in *Prigg v. Pennsylvania*.[460] When Congress attempted to solve the problem of slavery through enactment of the Missouri Compromise, the Supreme Court invalidated the effort in *Dred Scott*, this time leading to the Civil War.[461] During the post-Civil War Reconstruction period, when Congress attempted to protect former slaves from virulent racial discrimination, the Supreme Court invalidated congressional efforts to reach private discrimination.[462] In modern times, when federal, state and local governments have attempted to protect the interests of racial minorities through affirmative action programs, the Supreme Court has begun routinely to invalidate those programs.[463] And when Congress and the Attorney General have attempted to prevent minority vote dilution under the Voting Rights Act of 1965, the Supreme Court has begun routinely to invalidate those efforts as well.[464] As was true with the Supreme Court's intervention in the abortion issue, the Court's interventions

459. *See, e.g.*, STONE ET AL., *supra* note 128, at 986-87 (suggesting that well-organized pro-life movement may not have developed if right to abortion had emerged from political process rather than from Supreme Court); Mark V. Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. & SOC'Y 403, 414 (1989) (same); *cf.* Ginsburg, *supra* note 454, at 376, 379-83 (suggesting that *Roe* might have generated less public opposition if it had been rooted in equality rather than substantive due process concerns). *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 185-89, 234-35 (1991) (detailing the heightened abortion-related political activity following the Court's decision in *Roe*).

460. *See supra* notes 382-84 and accompanying text (discussing *Prigg*).

461. *See supra* notes 385-88 and accompanying text (discussing *Dred Scott* and Civil War).

462. *See supra* notes 389-91 and accompanying text (discussing Reconstruction and state-action requirement).

463. *See supra* note 412 and accompanying text (discussing invalidated affirmative action programs).

464. *See supra* notes 409-12 and accompanying text (discussing invalidated majority-minority districts under Voting Rights Act).

into racial politics "feel" very political. And under the politics of the current Supreme Court, those efforts "feel" destined to have an adverse effect on the interests of racial minorities as well.

The highly political nature of the affirmative action issue indicates that there is no democratically useful role for the Supreme Court to play in its resolution. The Court should treat the desirability of affirmative action as a political question rather than as a judicial question, but the Court's history suggests that the Court is unwilling to do this. The Supreme Court seems attracted to political controversy and distrustful of political solutions to social problems, which it deems itself better equipped to resolve. It is unclear why the Court believes that it has a useful policymaking role to play when governing legal standards are doctrinally indeterminate. But it is clear that the Court often does believe such judicial intervention to be appropriate. Accepting the inevitability of Supreme Court participation in the process of controversial political policymaking, it seems reasonable to ask that the Court's interventions at least be evenhanded rather than one-sided. Because the Supreme Court has now intervened to invalidate most affirmative action programs, evenhanded intervention requires the Court also to invalidate most categorical prohibitions on affirmative action, including Proposition 209.

B. *Washington v. Davis*

The Supreme Court has decided that the judiciary, rather than the political branches of government, should control the availability of affirmative action. As a result, the Court permits the political process to implement affirmative action programs only when the Court determines, after subjecting such programs to heightened scrutiny, that those programs comply with norms that the Court finds in the Constitution. Proposition 209 is an affirmative action program because it redistributes resources on the basis of race and gender just as other affirmative actions programs do. To be consistent, therefore, the Court should permit Proposition 209 to ban traditional affirmative action programs only if the Court, after applying that same heightened scrutiny, determines that Proposition 209 complies with those same constitutional norms. If the Court were to override the political process when it took actions designed to benefit women and racial minorities, but not when it took actions designed to benefit white males, the Court would be engaged in classic race and gender discrimination.

If the Supreme Court declines to treat Proposition 209 as a race and gender classification that is analogous to traditional affirmative action, Proposition 209 is still subject to heightened scrutiny under an equal protection analysis. Under *Washington v. Davis*[465] and its progeny, the constitutionality of a governmental classification that is not expressly based on race or gender is to be determined by the intent which motivated the classification. If a classification was adopted with discriminatory intent, it constitutes a race or gender classification that is subject to heightened scrutiny under the Equal Protection Clause.[466] Although a *Washington v. Davis* analysis cannot eliminate doctrinal indeterminacy from the Court's equal protection analysis, it can resolve the constitutional issues raised by Proposition 209 in a way that is intuitively compelling. When the *Washington v. Davis* intent test is applied to Proposition 209, a number of factors indicate that the Proposition 209 categorical prohibition on affirmative action constitutes a race and gender classification that triggers heightened equal protection scrutiny.

Proposition 209 is ultimately best understood as an effort to discount the interests of women and racial minorities in order to advance the interests of white males. As a result, Proposition 209 cannot withstand heightened scrutiny. Indeed, the Supreme Court's recent decision in *Romer v. Evans*[467] indicates that the animus embedded in such invidious discrimination could not even withstand rational-basis review. The Supreme Court should therefore hold that Proposition 209 is unconstitutional for the same reason that it has held affirmative action programs to be unconstitutional: Proposition 209 constitutes an intentional effort by the majority to allocate societal resources on the basis of race and gender.

1. *Consistency*. In *Adarand Constructors, Inc. v. Pena*,[468] the Supreme Court went to great pains to stress the need for

465. 426 U.S. 229 (1976).

466. *See id.* at 238-48; *see also* Personnel Adm'r v. Feeney, 442 U.S. 256, 271-74 (1979) (applying *Washington v. Davis* intentional discrimination test to gender classifications). *See generally* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 131-38 (arguing that the overarching theme uniting equal protection jurisprudence under rational-basis review, as well as heightened scrutiny, is that the Equal Protection Clause prohibits classifications based on "naked preferences" designed to advantage one group over another rather than to advance some public value).

467. 116 S. Ct. 1620, 1628-29 (1996) (invalidating Amendment 2 to the Colorado Constitution because it was not "directed to any identifiable legitimate purpose").

468. 515 U.S. 200 (1995).

"consistency" in the application of equal protection principles, emphasizing that the Equal Protection Clause extends the same equality guarantee to all individuals regardless of race, or, presumably, gender.[469] As a result, the Court held that heightened scrutiny applies to all suspect classifications, whether benign or invidious, irregardless of where the benefits and burdens fall.[470] Although the *Adarand* Court was attempting to explain why the Equal Protection Clause should be read to protect the interests of the white majority from majoritarian enactments, it certainly cannot be that the equal protection guarantee applies with *less* force to the interests of women and racial minorities. Women and racial minorities are typically deemed to be more vulnerable than members of the majority to majoritarian abuses, and therefore are more in need of countermajoritarian judicial protection.[471]

In *Adarand*, the Supreme Court held that racial affirmative action programs were subject to strict equal protection scrutiny, thereby effectively invalidating most race-based affirmative action.[472] The Court's treatment of gender as a suspect classification indicates that *Adarand* also invalidates gender-based affirmative action programs that cannot survive the stringent intermediate scrutiny standard presently applicable to gender-based classifications.[473] If the Supreme Court were to apply a more deferential level of constitutional analysis to the Proposition 209 preference prohibition than the Court applies to the affirmative action plans that it invalidates, the Court would itself be acting in a discriminatory manner. Such selective judicial intervention would invalidate governmental affirmative action programs that benefit women and racial minorities, but would permit governmental actions, such as Proposition 209, that benefit white

469. *See id.* at 224, 229-30.

470. *See id.* at 227. Although *Adarand* concerned the issue of race, there is no reason to believe that its consistency requirement does not apply to gender.

471. *See generally* ELY, *supra* note 280, at 135-79 (elaborating representation-reinforcement theory of judicial review).

472. *See Adarand*, 515 U.S. at 223-27, 235; *see also* STONE ET AL., *supra* note 128, at 601 (noting that the Supreme Court has not upheld a racial classification under strict scrutiny since its 1944 decision in *Korematsu*). *But cf. Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"); Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194-95 (1997) (applying what appears to be rational-basis scrutiny, based on evidence that race was not predominant factor, to uphold voter redistricting plan that considered race as factor, but did not result in majority-minority district).

473. *See The VMI Case*, 116 S. Ct. 2264, 2275 (1996) (requiring "exceedingly persuasive" justification for gender classifications to be upheld).

males by prohibiting affirmative action. To satisfy the *Adarand* command of consistency, therefore, the Court should subject prohibitions on constitutionally valid affirmative action to the same heightened scrutiny that it applies to affirmative action itself. In that way, affirmative action programs and prohibitions on affirmative action programs will be treated in an equivalent manner. Both will be upheld only to the extent that they can survive heightened equal protection scrutiny.

Although it might at first seem that the Supreme Court could behave in a consistent manner by both invalidating affirmative action and upholding political efforts to invalidate affirmative action, those actions would, in fact, be inconsistent. Proposition 209 reallocates resources on the basis of race and gender in precisely the same sense that affirmative action does. Both alter the status quo, and both do so for explicitly race- and gender-conscious reasons. Affirmative action alters the status quo by taking resources that would go to white males under a pre-affirmative action allocation scheme and redistributing them to women and minorities. Proposition 209 alters the status quo by taking resources that would go to women and minorities under an affirmative action allocation scheme and redistributing them to white males. Proposition 209 also redistributes resources by prohibiting future affirmative action programs that would have been adopted but for the Proposition 209 injunction on affirmative action, because it diverts to white males resources that the political process would otherwise have allocated to women and minorities.[474] In terms of resource redistribution, therefore, Proposition 209 and affirmative action are simply opposite sides of the same coin. Proposition 209 is an affirmative action program for white males.

Although Proposition 209 redistributes resources on the basis of race and gender, Proposition 209 proponents nevertheless claim that Proposition 209 is race- and gender-neutral.[475] What they must mean

474. One of my colleagues suggested that on the date that Proposition 209 took effect it might be a race- and gender-conscious redistribution measure with respect to existing but not future affirmative action programs. With respect to future programs, Proposition 209 would not change the status quo, and therefore would not redistribute any resources. This formalist argument employs a view of the status quo that reads the Equal Protection Clause to be more concerned with Proposition 209's date of enactment than with its discriminatory or nondiscriminatory effect. It seems more meaningful to use a functional conception of the status quo as consisting of whatever outcome the political process would have produced in the absence of Proposition 209.

475. *See, e.g.*, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir.) ("A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify

by this claim is that they favor Proposition 209 redistributions over affirmative action redistributions because Proposition 209 redistributes resources in a way that restores the allocations that existed before affirmative action programs began tampering with the "normal" distribution of resources.[476] But that preference for pre-affirmative action allocations is both doctrinally irrelevant and analytically problematic. The preference is doctrinally irrelevant because the *Adarand* consistency requirement subjects *all* race- and gender-conscious redistributions of resources to the same heightened scrutiny regardless of whether the redistributions are benign or invidious, and regardless of which groups they benefit and burden. Although the arguments favoring a particular redistribution are relevant to the issue of whether the redistribution can survive heightened judicial scrutiny, those arguments are not relevant to the threshold issue of whether the redistribution triggers heightened scrutiny. Under *Adarand*, heightened scrutiny is triggered by both affirmative action and Proposition 209, simply because both are race- and gender-conscious redistribution measures.

The Proposition 209 preference for pre-affirmative action allocations of resources is analytically problematic because it ultimately turns the Equal Protection Clause on its head. Although Proposition 209 and affirmative action are both race- and gender-conscious redistribution measures, their reasons for redistributing resources are very different. Affirmative action redistributes resources in order to remedy the lingering effects of a prior discriminatory allocation scheme, while Proposition 209 redistributes resources in order to nullify affirmative action remedies and reinstate prior discriminatory allocations. The accuracy of this characterization becomes particularly apparent when one focuses upon the Supreme Court's current affirmative action jurisprudence.

As has been noted, Proposition 209 meaningfully prohibits only those affirmative action preferences that the Equal Protection Clause itself permits.[477] Under current law, the Equal Protection Clause appears to permit only affirmative action programs that are *necessary* to

individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense."), *cert. denied*, 118 S. Ct. 397 (1997).

476. Use of the term "normal" in this context, of course, simply states a normative preference for a particular analytical baseline. *See supra* notes 210-12 and accompanying text (discussing baseline assumptions).

477. *See supra* Part I.B.1 (discussing distinction between discrimination and preferences).

remedy identifiable and particularized acts of past discrimination, where the need to provide a remedy for that discrimination is either "compelling" or is based upon an "exceedingly persuasive" justification.[478] Indeed, if any race-neutral or more narrowly-tailored alternatives to affirmative action exist for redressing past discrimination, the Supreme Court appears unwilling to uphold the constitutionality of an affirmative action remedy.[479] Therefore, when Proposition 209 invalidates a constitutionally valid affirmative action program it precludes the possibility of *any* meaningful remedy for past discrimination.[480] It relegates the victims of past discrimination to remedies that the Supreme Court would by hypothesis hold to be inadequate means of pursuing a goal that the Supreme Court would by hypothesis hold to be compelling. A reading of the Equal Protection Clause that permitted Proposition 209 to preclude remedies that the Equal Protection Clause itself recognized as the only adequate way to eliminate the continuing effects of past discrimination would be perverse. It would turn the Equal Protection Clause into a device for promoting rather than preventing race and gender discrimination.

478. Racial affirmative action is constitutional only if it is narrowly tailored to advance a compelling governmental interest, *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), and the only interest that the Court currently seems willing to recognize as compelling is the interest in remedying relatively specific acts of past discrimination, *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497-99 (1989). Because gender-based classifications are now subject to stringent intermediate scrutiny requirements, *see The VMI Case*, 116 S. Ct. 2264, 2275 (1996), gender affirmative action may also be limited to cases in which affirmative action is a necessary remedy for past discrimination. It is possible, but not likely, that the Supreme Court will hold the promotion of prospective diversity to be an adequate basis for valid affirmative action. *See* Spann, *supra* note 194, at 28-30 (suggesting that prospective diversity might also constitute a compelling governmental interest). *But see* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.) (rejecting prospective diversity as compelling governmental interest), *cert. denied*, 116 S. Ct. 2581 (1996). The Supreme Court's grant of certiorari in *Taxman v. Piscataway Township Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997), which presented the statutory issue of whether Title VII permits the non-remedial use of racial affirmative action for prospective diversity reasons, would have given the Court an opportunity to provide clearer guidance with respect to the permissible bases for affirmative action. However, the *Piscataway* case was settled by the parties prior to oral argument in the Supreme Court, thereby mooting the Supreme Court appeal. See Biskupic, *supra* note 43, at A1; Greenhouse, *supra* note 43, at A1.

479. *See Adarand*, 515 U.S. at 237-38; *see also Croson*, 488 U.S. at 507-08 (requiring narrow tailoring).

480. If you are tempted to argue that Proposition 209 does not prohibit prior discrimination from ever being undone, but only prohibits remedies for prior discrimination from being implemented through race- or gender-conscious means, remember that the Supreme Court will permit race- and gender-conscious affirmative action remedies only when neutral remedies would not be effective. *See supra* notes 430-31 and accompanying text.

Although the affirmative action programs prohibited by Proposition 209 are by hypothesis constitutional,[481] that fact alone would not normally preclude a state constitution from prohibiting them. States are not obligated to follow policies simply because the United States Constitution does not prohibit them. In the affirmative action context, however, constitutional authorization may well coincide with constitutional compulsion. The Supreme Court has adopted such stringent standards to govern the constitutionality of affirmative action programs that the only programs that will continue are those programs that constitute the sole available alternative for eliminating past discrimination.[482] As a result, most race and gender affirmative action programs will now be unconstitutional. But the programs that survive the demanding Supreme Court standards will necessarily be so essential to the elimination of ongoing discrimination that it may well violate the Equal Protection Clause for the government to prohibit them. Because the Proposition 209 ban on affirmative action is a race- and gender-conscious redistribution, it will not be constitutional unless its justification for banning affirmative action can survive heightened scrutiny. However, when the only justification for prohibiting affirmative action is to foreclose the only available remedy for discrimination, a ban on affirmative action becomes an act of discrimination that cannot survive heightened scrutiny.[483]

It is important to remember that the Constitution applies to the Supreme Court as well as to the political branches of government. Just as the Equal Protection Clause prohibits the California electorate from according more favorable political treatment to white males than it accords women and minorities, the Equal Protection Clause also prohibits the Supreme Court from according more favorable judicial treatment to white males than it accords women and minorities. The fact that no other branch of government can easily enforce the Equal Protection Clause against the Supreme Court does not mean that the Court has license to ignore the Constitution. Rather, it means that the Court must demonstrate a particularly high level of judicial integrity in order to preserve its own constitutional legiti-

481. Again, the Proposition 209 preference prohibition is meaningful only with respect to affirmative action programs that are not already prohibited by the Constitution. *See supra* Part I.B.1.

482. *See supra* notes 477-80 and accompanying text (describing stringency of current Supreme Court affirmative action standards).

483. The application of heightened scrutiny to Proposition 209 is discussed in more detail in Parts III.B.2-3, *infra*.

macy. If the Court were to apply different constitutional standards to Proposition 209 than it applies to other affirmative action programs, it would be discriminating against women and minorities in both substantive and procedural ways.

As a substantive matter, if the Court were to apply deferential scrutiny to uphold Proposition 209 redistributions of resources when it has consistently applied heightened scrutiny to invalidate affirmative action redistributions would constitute race and gender discrimination favoring white males. As has been shown, the Court would be acquiescing in the discriminatory allocation of resources when that allocation benefited white males, but not when it benefited women or minorities. And the Court would be permitting the political process to use race- and gender-conscious techniques to perpetuate past discrimination, but not to provide remedies for such discrimination. That would violate both the consistency requirement of *Adarand* and the nondiscrimination requirement of the Equal Protection Clause itself.

As a procedural matter, the application of relaxed evidentiary standards to Proposition 209 would also discriminate against women and minorities, since the Court has consistently applied stringent evidentiary standards to affirmative action programs that benefit women and minorities. The Supreme Court now insists on a fact-specific, case-by-case analysis of affirmative action programs that benefit women and minorities in order to determine whether those programs are constitutional.[484] The Proposition 209 "affirmative action" program for white males, however, applies across the board. It is not limited to any of the fact-specific, case-by-case demonstrations of momentous need and narrow tailoring that the Court requires for affirmative action programs that benefit women and minorities.[485] Therefore, if the Supreme Court were to uphold Proposition 209 despite its overbreadth, it would be applying a different, less-demanding evidentiary standard to affirmative action programs that benefited white males than it applies to affirmative action for women and minorities. This would again violate the consistency requirement of *Adarand* and the neutrality requirement of the Equal Protection Clause.

484. *See Adarand*, 515 U.S. at 225-29 (emphasizing need for strict scrutiny to determine whether affirmative action plan is truly benign and remedial).

485. *See supra* notes 478-80 and accompanying text.

Proposition 209 is a race and gender classification that should be subjected to heightened equal protection scrutiny. It is a race and gender classification because it redistributes resources based on race and gender, in precisely the same sense that affirmative action does. Moreover, it expressly singles out race and gender for special treatment that is not applied to preferences for veterans, athletes, and the other preferences identified by the district court for which Proposition 209 leaves the status quo allocation of resources in place.[486] However, even if Proposition 209 is somehow deemed not to be an affirmative action program for white males, it is still a race and gender classification triggering heightened equal protection scrutiny under *Washington v. Davis*.

2. *Intentional Discrimination*. In Washington v. Davis, the Supreme Court held that the way to determine whether a facially neutral classification constitutes a race or gender classification is to ascertain the intent with which the classification was adopted.[487] If a classification results from an intent to discriminate against women or racial minorities, then it is a race or gender classification despite its facial neutrality.[488] Surprisingly, the lower courts in Coalition for Economic Equity did not conduct a Washington v. Davis intentional discrimination analysis of the Proposition 209 preference prohibition.[489] Both courts focused instead on the Supreme Court's political restructuring cases in analyzing the constitutionality of Proposition 209.[490] This focus is unfortunate because the Supreme Court's political structure jurisprudence has never been doctrinally

486. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1498 n.19, 1499, 1505 (N.D. Cal. 1996) (enumerating types of affirmative action preferences that are permitted by Proposition 209), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

487. *See* Washington v. Davis, 426 U.S. 220, 239-45 (1976).

488. *See id.*; Personnel Adm'r v. Feeney, 442 U.S. 256, 271-74 (1979) (applying *Washington v. Davis* intentional discrimination test to gender classifications).

489. Perhaps one reason that the lower courts chose not to conduct a *Washington v. Davis* intentional discrimination analysis is that language in the *Seattle* case suggested that the *Washington v. Davis* intent test was not applicable to measures that explicitly mention race, as does Proposition 209. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484-87 (1982) (suggesting that intent analysis is inapplicable when facially race-conscious legislation is involved). *But cf. id.* at 471-74 (conducting apparent intent analysis). This, however, does not fully explain why the lower courts chose to characterize Proposition 209 as a political restructuring case. *Cf.* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701-02 (9th Cir.) (conducting "conventional" equal protection analysis of Proposition 209), *cert. denied*, 118 S. Ct. 397 (1997).

490. *See supra* Part II.

intelligible or viscerally satisfying.[491] Moreover, the political restructuring cases may not be followed by the members of the present Supreme Court.[492]

The *Washington v. Davis* intentional discrimination standard cannot itself eliminate the doctrinal indeterminacy that permeated the political structure analyses of the lower courts in *Coalition for Economic Equity*, but it can provide an intuitively accessible analysis that is viscerally more satisfying than the analyses offered by the lower courts. One reason that *Washington v. Davis* cannot eliminate doctrinal indeterminacy is that a subsequent Supreme Court gloss on that case's intentional discrimination standard makes the concept of discriminatory intent highly elusive. In *Personnel Administrator v. Feeney*,[493] the Court distinguished between prohibited discriminatory intent, and mere awareness of non-motivating discriminatory effects, which the Court did not view as constitutionally impermissible.[494] Accordingly, the Court held that the enactment of a Massachusetts veterans preference law did not constitute intentional discrimination within the meaning of *Washington v. Davis*.[495] The Massachusetts Legislature, while aware of the gender discriminatory impact of the law, did not enact the law "because of" its discriminatory impact; rather, the Legislature enacted the law for the purpose of benefiting veterans, "in spite of" its gender discriminatory impact.[496]

491. *See supra* Parts II.A.2 and II.B.2 (discussing doctrinal difficulties inherent in political restructuring cases); *see also* Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 76 (noting that "the political process decisions struck many commentators as anomalous").

492. In the district court, proponents of Proposition 209 argued that the Supreme Court's political restructuring precedents should not be followed because they were likely to be overruled by the present Court. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1504 n.25 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

493. 442 U.S. 256 (1979).

494. *See id.* at 278-79 (holding that legislation passed "because of" adverse effects on an identifiable group has a "discriminatory purpose," while legislation passed "in spite of" such effects does not).

495. *See id.* at 281.

496. *See id.* The continuing importance of *Washington v. Davis*, 426 U.S. 229 (1976), should be considered in light of *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996). In *M.L.B.*, the Court held that the application to an indigent mother of a state rule requiring the payment of a transcript fee in order to appeal a judicial decision terminating the mother's parental rights was unconstitutional. *See id.* at 568-69. The dissent hastened to point out that the transcript fee may have had a disparate impact on indigents, but it did not constitute intentional discrimination under *Washington v. Davis*. *See id.* at 573-75 (Thomas, J., dissenting). Intuitively, the transcript fee requirement would not seem to satisfy the *Washington v. Davis* intentional discrimination standard because the requirement was almost certainly intended to be a revenue-generating meas-

The *Feeney* construct suffers from the same analytical baseline difficulties that destabilized the political structure analyses of the lower courts in *Coalition for Economic Equity*.[497] If one assumes that the Massachusetts Legislature in *Feeney* was not responsible for the fact that the beneficiaries of its law were overwhelmingly male, the veterans preference law looks like a mere gender-neutral effort to express gratitude to veterans for their national defense efforts. However, if one focuses on the fact that the Massachusetts Legislature elected to give a preference to veterans (who are overwhelmingly male because of the express discriminatory practices of the United States military in excluding women from conscription and combat), rather than to equally indispensable nurses or elementary school teachers (who are overwhelmingly female because of cultural gender-role stereotypes), then the veterans preference law begins to look a lot more like intentional discrimination that endorses the sexist inclinations of the military.[498] Ultimately, any known (or even unknown)

ure that was adopted "in spite of" rather than "because of" its adverse impact on indigents. However, because neither opinion devoted much attention to the *Feeney* decision, it seems unlikely that the Court intended a major revision of the *Washington v. Davis* standard. The case, however, does seem to illustrate that there is sufficient play in the *Washington v. Davis* intentional discrimination test to permit the test to be sidestepped when it stands in the way of the outcome that the Court desires.

An additional difficulty presented by the *Washington v. Davis* intentional discrimination standard relates to its application in nonfeasance cases. Although language in *Crawford* suggests that a race-neutral repeal of measures that benefit racial minorities is not unconstitutional, *see* Crawford v. Board of Educ., 458 U.S. 527, 535-42 (1982), the *Washington v. Davis* test seems to indicate that if a repeal is not race-neutral, but rather is motivated by discriminatory intent, it will be subject to heightened scrutiny notwithstanding the fact that it is a repeal. Assuming that this is true, it remains unclear how the *Washington v. Davis* intent test should apply to nonfeasance situations in which the legislature does not repeal anything but simply fails to adopt a measure that would benefit a protected minority group. This is something that all legislatures do almost everyday. In principle, such nonfeasance does not pose a difficult problem. If the failure to enact a measure that would benefit a protected minority group results from discriminatory intent, the measure is subject to heightened scrutiny under *Washington v. Davis*. As a practical matter, however, such a showing will be very difficult to make. The many other legislative priorities and considerations that compete with the unadopted minority measure will almost always protect mere legislative inaction from heightened scrutiny under *Feeney*. However, in those rare cases in which there is adequate evidence of discriminatory intent, *Washington v. Davis* would seem to require strict scrutiny of even legislative nonfeasance—although fashioning an appropriate remedy could be problematic. This conclusion seems to be reinforced by the Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), which can be read to require a legislature to adopt measures that benefit protected minorities whenever it has adopted similar measures to benefit other groups. *See infra* Part III.B.3 (discussing *Romer*).

497. *See supra* Part II (discussing baseline problems in lower court analyses).

498. Note that Congress may be more responsible for some of these discriminatory inclinations than the military. It was Congress that insisted on excluding women from the present

disparate effects of a government action can be deemed to constitute intentional discrimination by selecting the appropriate analytical baseline. And there is no way to prefer one baseline to another without invoking some pre-analytical normative preference.[499]

Although a *Washington v. Davis* intentional discrimination analysis cannot eliminate the doctrinal indeterminacy inherent in a constitutional evaluation of Proposition 209, it can provide an analysis that is viscerally more appealing than the political structure analyses undertaken by the lower courts. A *Washington v. Davis* analysis is more appealing because the concept of intentional discrimination is intuitively more accessible than the concept of an improperly structured political process. Most people have no idea what constitutes improper political structuring, and the Supreme Court political-structuring precedents are difficult to reconcile. But everyone has some idea of what intentional discrimination is. In fact, to the extent that the political restructuring cases have any intuitive appeal at all, it is because they recognize that some restructurings of the political process are invidiously motivated within the meaning of the *Washington v. Davis* intentional discrimination standard.[500] Although it is

draft registration requirement, even though the Department of Defense did not oppose the registration of women. *See* Rostker v. Goldberg, 453 U.S. 57, 97-102 (1981) (Marshall, J., dissenting).

499. When a government adopts a preference "in spite of" its known discriminatory effects, the government is determining that the benefits of the preference outweigh the costs of the attendant discrimination. When the government adopts a preference with unknown discriminatory effects, the government is simply deciding not to incur the costs necessary to determine whether its preference will be discriminatory. Both government actions can, therefore, be characterized as "intentional." The abstract distinction between intentional discrimination and mere discriminatory effects is deconstructed in SPANN, *supra* note 127, at 60-66.

500. Note that this analysis permits one to make sense of the elusive distinction that the Supreme Court has drawn between an impermissible restructuring of the political process and a permissible repeal of a program that benefits a minority group. *See supra* notes 264-75 and accompanying text (discussing political restructuring cases). If the government action—whether a formal restructuring or a mere repeal—is motivated by discriminatory intent, then that action constitutes an impermissible race or gender classification under *Washington v. Davis*. It is *motive*, rather than the untenable distinction between restructuring and repeal, that is dispositive. *But see* Amar & Caminker, *supra* note 24, at 1023-24, 1034-35 (arguing that Proposition 209 is unconstitutional under Supreme Court's political restructuring precedents, but not under *Washington v. Davis* intentional discrimination analysis). This intent analysis also permits one to make sense of *Loving*. The Virginia antimiscegenation statute that the Court invalidated in *Loving* accorded identical treatment to all racial groups. *See supra* notes 328-32 and accompanying text (discussing *Loving*). However, the statute was nevertheless unconstitutional under the *Washington v. Davis* standard because it was motivated by racial animus toward blacks, in that it was "obviously an endorsement of the doctrine of White Supremacy." Loving v. Virginia, 388 U.S. 1, 7 (1967) (characterizing justification for miscegenation statute offered by Virginia Supreme Court of Appeals in *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955)); *see also id.* at 11

true that the concept of intent can be manipulated, and the distinction between intent and effects can be deconstructed,[501] most people will share a conception of intentional discrimination that is stable enough to resist efforts at result-oriented manipulation or esoteric deconstruction. When this intuitively accessible conception of intentional discrimination is applied to Proposition 209 under *Washington v. Davis*, the Proposition 209 preference prohibition looks like a race and gender classification.

The stated goal of Proposition 209 is to promote race and gender neutrality, but there are many reasons to conclude that the voters of California were engaged in intentional discrimination when they adopted it. First, the claim that Proposition 209 was adopted in order to advance egalitarian social goals has little inherent credibility. Second, the political climate out of which Proposition 209 emerged calls into question the sincerity of the claim that Proposition 209 was motivated by the desire to achieve race and gender neutrality. Third, political support for Proposition 209 is demographically so polarized that it suggests that the white male supporters of Proposition 209 are primarily concerned with protecting their own interests. Fourth, Proposition 209 is only one of several recent California efforts that seem suspiciously elitist or xenophobic in nature, thereby further undermining the purported egalitarian nature of Proposition 209. Finally, Proposition 209 is an example of the phenomenon, recently witnessed in South Africa, in which the holders of dominant cultural power become interested in equality only when they begin to fear that they are on the verge of losing their cultural dominance.[502]

The egalitarian depiction of Proposition 209 as a measure designed to advance the goal of equality has little inherent credibility. As has been discussed, proponents of Proposition 209 argue that their ballot initiative was designed not to discriminate on the basis of race or gender, but to promote prospective race and gender neutrality.[503] Given this claim, it is more than a little ironic that Proposition 209

("[T]he racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

501. *See* SPANN, *supra* note 127, at 60-66.

502. Some commentators have argued that Proposition 209 exemplifies the very type of abuse resulting from untamed majoritarian passions that the Framers intended to avoid by providing for a republican form of government rather than a direct democracy. As a result, they argue that ballot initiatives such as Proposition 209 are unconstitutional as a violation of the Guarantee Clause, U.S. CONST. art. IV, § 4. *See* Rogers & Faigman, *supra* note 24, at 1066-72.

503. *See supra* Part I.C.1 (discussing moral high ground claimed by proponents of Proposition 209).

campaign organizers made conscious, politically-motivated efforts to place women and minorities in top positions in the Proposition 209 campaign. As the Proposition 209 campaign manager remarked, "It was like using affirmative action to defeat affirmative action . . . . We were being pretty cynical, I have to admit."[504] It is also noteworthy that Proposition 209 recognizes convenient financial limits on its commitment to equality. By its terms, Section 31(e) of Proposition 209 terminates its insistence on race and gender neutrality whenever adherence to the neutrality principle would result in a loss of federal funds to the State.[505]

Although the Proposition 209 prohibition on affirmative action preferences will have a disproportionately adverse impact on the interests of women and racial minorities,[506] proponents of Proposition 209 would presumably argue that Proposition 209 is governed by *Feeney* and not by *Washington v. Davis*, because the primary purpose of California voters in adopting Proposition 209 was to promote race and gender neutrality "in spite of" rather than "because of" the disparate impact that Proposition 209 will have. That argument, however, is difficult to take seriously. Throughout the history of the Nation, white males have controlled the bulk of the social, economic and political power exercised in the United States, typically by using formal legal rules to secure and retain their control over that power. Initially, the rules were crass and blatantly discriminatory, as when the government claimed title to lands forcibly taken from Native Americans,[507] or pronounced that black slaves were the property of white slave owners,[508] or denied women the right to own property[509] or

504. Barry Bearak, *Questions of Race Run Deep for Foe of Preferences*, N.Y. TIMES, July 27, 1997, at A1.

505. *See* Proposition 209, § 31(c). For the full text of Proposition 209, see *supra* note 49.

506. *See supra* notes 65-72 and accompanying text (discussing district court findings of adverse impact Proposition 209 will have on women and racial minorities).

507. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-92 (1823) (holding that United States title to Native American lands was acquired through discovery and conquest); *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that United States possesses title to Native American lands).

508. *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611, 613, 625-26 (1842) (invalidating state statute as conflicting with property rights of white slave owners protected by federal law under Rendition Clause of United States Constitution and under congressionally enacted Fugitive Slave Act of 1793).

509. *Cf.* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 162-63 (discussing Fourteenth Amendment's one-time impotence in the face of state laws restricting married women's ability to "contract, hold property, litigate on their own behalf, or even control their own earnings").

to vote.[510] Since the adoption of the Fourteenth Amendment, legal techniques for the retention of power and resources by white males have been more subtle and facially more neutral. But the effects have remained discriminatory. Thus, the government now takes lands from Native Americans by invoking the doctrine of sovereign immunity,[511] keeps black children out of white schools through legal authorization of de facto rather than de jure segregation,[512] and denies women the same level of health benefits that men receive by basing its denials on pregnancy rather than on gender.[513] Any neutrality in the way that the government allocates power and resources is more rhetorical than real.

Since the days of *Plessy*, government insistence on equality has been the preferred method for denying power to minorities who would share resources with the majority.[514] Revealingly, proponents of Proposition 209 supported their political cause by invoking the concept of colorblindness articulated in Justice Harlan's *Plessy* dissent,[515] even though Justice Harlan's views rested on explicit claims of white supremacy.[516] This "equality" technique for refusing to share resources has outlived even the Supreme Court's 1954 overruling of *Plessy* in *Brown v. Board of Education*.[517] Now, equality has come to mean that existing levels of general societal discrimination against women and minorities must simply be disregarded in order to pursue

510. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (upholding state's right to refuse to allow women to vote).

511. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2033-35 (1997) (using Eleventh Amendment's embodiment of sovereign immunity doctrine to dismiss suit alleging state interference with Native American ownership of tribal lands); *cf.* Seminole Tribe v. Florida, 116 S. Ct. 1114, 1122-31 (1996) (using doctrine of sovereign immunity as embodied in the Eleventh Amendment to dismiss suit alleging unlawful state interference with federally protected use of tribal lands for gaming activities).

512. *See supra* notes 396-402 and accompanying text.

513. *See supra* notes 428, 435 and accompanying text.

514. *See* Plessy v. Ferguson, 163 U.S. 537, 548, 551-52 (1896) (upholding separate-but-equal public facilities); *cf. supra* note 13 and accompanying text (citing cases in which "equality" has been used to deny resources to minorities).

515. *See* H. Pashler, *Yes on 209 Campaign Bulletin* (visited Sept. 23, 1996) <http://192.41.11.185/ccri/bb/843461540.html> (quoting statement in Justice Harlan's *Plessy* dissent asserting that "[o]ur Constitution is color-blind" to support adoption of Proposition 209).

516. *See supra* notes 191-94 and accompanying text (discussing Professor Gotanda's interpretation of Justice Harlan's vision of colorblindness).

517. *Brown I*, 347 U.S. 483, 495 (1954) (overruling *Plessy* and declaring unconstitutional separate-but-equal public facilities); *see also supra* notes 395-402 and accompanying text (describing how *Brown* principle of equality has resulted in perpetuation of single race schools).

the abstract principle of prospective neutrality.[518] Although this argument is nothing more than an artifact of a normative baseline preference,[519] it is a difficult argument to rebut in a culture whose attention span often extends only as far as the next political sound bite or recollection of the last economic recession. The equality technique of contemporary oppression, therefore, possesses enhanced utility precisely because it is too slippery for its victims to get a firm handle on in a legal regime that refuses to accord legal significance to mere discriminatory effects. Moreover, the equality technique of oppression permits the beneficiaries of the present resource allocation scheme to congratulate themselves for their own commitment to egalitarian principles—principles that, in *Feeney* terms, merely happen to give a disproportionate share of societal wealth to the present beneficiaries "in spite of" their egalitarian intent. When proponents of Proposition 209 insist that they are committed to the egalitarian principle of race and gender neutrality, it is this brand of oppressive equality that immediately comes to mind. This neutrality claim sounds frighteningly similar to the neutrality claims that have repeatedly been advanced since the separate-but-equal neutrality of *Plessy*. And although proponents of Proposition 209 insist that this time things are different—that this time the neutrality claim is *really* meant to be sincere—it is unlikely that anyone without a direct stake in preserving the existing allocation of resources is inclined to be fooled.

The political climate from which Proposition 209 has emanated reinforces the belief that its claim of egalitarian purpose is more political than principled. Proposition 209 is part of the general anti-affirmative action backlash that emerged when white males began to resent their loss of jobs and educational opportunities to women and minorities in times of economic decline.[520] While Proposition 209 was

518. *See supra* note 254 and accompanying text (discussing contemporary Supreme Court view that general societal discrimination is not legally cognizable).

519. *See supra* notes 252-54 and accompanying text (discussing baseline assumptions in equal protection analysis).

520. *See, e.g.*, Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401, 1410 (1993) (noting changing white attitudes during economic decline); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1432-34 (1995) (discussing effect of economic decline on perception of affirmative action); Sean M. Scott, *Justice Redefined: Minority-Targeted Scholarships and the Struggle Against Racial Oppression*, 62 UMKC L. REV. 651, 663-67 (1994) (discussing lower-class white opposition to affirmative action that develops in times of economic decline).

a ballot initiative, Republican presidential candidates—including the Governor of California—were running on anti-affirmative action platforms in the 1996 Republican primaries; bills were being introduced in Congress to ban affirmative action; the Governor of California was banning affirmative action efforts by executive order; and the Regents of the University of California were banning affirmative action in University hiring and admissions.[521] Although proponents of Proposition 209 claimed to be committed to the allocation of resources on the basis of merit rather than on the basis of race or gender, they chose not to challenge affirmative action preferences such as the preference for athletes or children of alumni, even though such preferences appear to be responsible for more non-merit-based allocations of educational resources than race- or gender-based preferences.[522]

A simple thought experiment is sufficient to reveal just how little credibility there is in the claim that Proposition 209 was motivated by the desire to promote race and gender neutrality in the allocation of resources.[523] Demographically, white males are the only group that favored the adoption of Proposition 209. Women, blacks, Latinos and Asians all opposed adoption of the ballot initiative.[524] The structure of contemporary society is such that white males possess a disproportionately large share of society's power and resources, while women and minorities possess a share that is disproportionately small.[525] Proposition 209 preserves this allocation of power and resources, in the name of equality, by prohibiting redistributive affirmative action programs that would alter the status quo. Now imagine that the society is arranged so that white males possess a disproportionately small share of society's power and resources. Imagine that height, strength, seniority, grades, standardized test scores and country club connections all favor women and minorities, and disfavor white males. Would the equality principle to which white male supporters of Proposition 209 purport to adhere still cause those

521. *See supra* notes 171-76 and accompanying text (discussing anti-affirmative action political climate).

522. *See supra* note 230 and accompanying text (discussing Harvard alumni preference).

523. *Cf.* STONE ET AL., *supra* note 128, at 628-30 (proposing similar thought experiment to analyze racially-disparate impact of capital punishment).

524. *See supra* notes 178-80 and accompanying text (discussing demographic breakdown of Proposition 209 voting).

525. *See supra* Part I.C.5 (discussing statistical advantages that white males have over women and minorities).

white males to favor Proposition 209, even though it would perpetuate their own social, economic and political disadvantage? Only if the answer to this question is "yes" can we take seriously the claim that Proposition 209 was adopted in order to promote race and gender neutrality, rather than to preserve the existing allocation of societal benefits. But it is hard to imagine that the answer to this question could possibly be "yes." The demographic correlation between supporters and beneficiaries of Proposition 209—as well as between opponents of Proposition 209 and those who will be adversely affected by its adoption—suggests that much more is going on in the Proposition 209 debate than a disinterested dispute about abstract conceptions of equality. The issue of intentional resource allocation is what is really at the core of Proposition 209.

Proponents of Proposition 209 might argue that *Feeney* permits the voters of California to favor a diversion of societal resources from women and minorities to white males as long as the intent of the voters is to benefit white males and not to harm women and minorities.[526] Doctrinally, this reading of *Feeney* cannot be dismissed out of hand, because the content of the *Washington v. Davis* intentional discrimination standard is too amorphous to have any definitive meaning.[527] Intuitively, however, that reading seems hopelessly artificial. The current affirmative action controversy has arisen because race and gender groups are competing for the same limited supply of societal resources. The zero-sum nature of resource allocation in such circumstances means that white males cannot be benefited without harming the women and minorities who will be denied access to the resources that are reserved for white males. Everyone knows that this is so, and everyone knows it at a very conscious level. Accordingly, the choice between characterizing Proposition 209 as a measure designed to benefit white males or as a measure designed to harm women and minorities is simply an act of post hoc, result-oriented labeling.

The fact that the Supreme Court favored a "benefit" characterization over a "harm" characterization of legislative intent in *Feeney* does not undermine the strength of this insight, but rather illustrates

526. *See, e.g.*, Amar & Caminker, *supra* note 24, at 1023-24, 1034-35 (suggesting that Proposition 209 would not constitute intentional discrimination under *Feeney*); *cf.* Sunstein, *supra* note 466, at 157-64 (offering similar intentional discrimination argument to explain divergent outcomes in *Seattle* and *Crawford* cases).

527. *See supra* notes 497-99 and accompanying text (discussing difficulties with concept of intentional discrimination).

it. The Supreme Court could easily have come out the other way in *Feeney*, just as it has in the Voting Rights cases it has considered in the past several years.[528] In invalidating the redistricting plans at issue in those cases, the Court chose to characterize the plans as intentional efforts to harm white voters, although it could easily have characterized the plans as efforts to benefit minority voters—just as it characterized *Feeney* as an effort to benefit veterans. Moreover, under the permissive reading of *Feeney*, any law could be deemed valid no matter how blatantly discriminatory it appeared to be. Even laws prohibiting women from voting, or laws consigning blacks to slavery, would be permissible as long as one focused on the substantial benefits that such laws conferred on white males and treated as merely incidental the burdens that the laws imposed on women and minorities. The proposition that *Feeney* actually seems to stand for is the proposition that the relevant intent must be ascertained on an intuitive level, because the concept of intentional discrimination is simply not serviceable on a doctrinal level. And on an intuitive level, it seems clear that the white males who voted for Proposition 209 continue to believe that they are more entitled than women and minorities to win the ongoing competition for societal resources, just as they have always won that competition in the past.

Also significant to a determination of voter intent is the fact that Proposition 209 is but one of several recent measures adopted through the California political system that evidence xenophobic disregard for the interests of those who compete with the majority for a share of societal resources. Proposition 209, which prohibits redistribution of resources through affirmative action programs, was adopted in 1996.[529] Two years before the adoption of Proposition 209, in the November 8, 1994 general election, the California electorate adopted Proposition 187.[530] Proposition 187—which was also a response to budget shortfalls, reductions in essential services and record-high unemployment—denies public education, non-emergency medical services and public social services to aliens who are not legally in the United States.[531] Moreover, the preamble to Proposition 187 candidly conceded that its purpose was to prevent "economic

528. *See supra* note 412 and accompanying text.

529. *See supra* note 21 and accompanying text.

530. *See* Lolita K. Buckner Inniss, *California's Proposition 187—Does it Mean What it Says? Does it Say What it Means? A Textual and Constitutional Analysis*, 10 GEO. IMMIGR. L.J. 577, 578 (1996).

531. *See id.* at 578-81.

hardship caused by the presence of illegal aliens in this state."[532] Even if one believes that it is appropriate to deny resources to aliens who are not legally residing in the United States, Proposition 187 still supports the conclusion that California voters are more concerned with the self-interested allocation of societal resources than with the abstract concept of equality. Although the common law imposes no obligation to throw a rope to a person who is in danger of drowning, we are nevertheless justified in drawing an inference about the character of someone who refuses to provide any assistance in such a situation—even to a drowning trespasser.[533]

In 1986, the California voters also used the ballot initiative process to adopt Proposition 63, which amended the State Constitution to declare that English was the official language of California.[534] The adoption of this official-English amendment, and of Proposition 187, have been attributed to anti-immigrant sentiment in California.[535] As has been noted, the Board of Regents of the University of California has voted to end all race and gender affirmative action in the University of California educational system.[536] As a result, black and Latino enrollments have dropped in law and medical schools, and no black students were admitted to the 1997 entering law school class at Berkeley.[537] In 1982, it was again the voters of California who used the

532. *See id*. at 617 (quoting section 1 of Proposition 187).

533. Implementation of Proposition 187 has been delayed by a preliminary injunction issued in the course of ongoing litigation concerning the constitutionality of the ballot initiative. *See id*. at 578 (describing Proposition 187 litigation).

534. *See* CAL. CONST. art. III, § 6.

535. *See, e.g.*, Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1058 (1996) (attributing anti-immigrant sentiment to adoption of California official-English amendment and Proposition 187); Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1511 (1987) (characterizing California official-English amendment as hostile to minorities); Note, "*Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1358-59 (describing xenophobic origins of California official-English amendment).

536. *See supra* note 173 and accompanying text.

537. *See, e.g.*, Bearak, *supra* note 504, at A1 (reporting no blacks admitted to Berkeley law school 1997 entering class); Louis Freedberg, *UC's Law Admissions Investigated; U.S. Checking At 3 Schools For Violations Of Civil Rights*, S.F. CHRON., July 15, 1997, at A1 (same); Amy Wallace, *UC Law Schools Face Discrimination Investigation; Education: Federal Civil Rights Office Probes Allegation that under the Ban on Affirmative Action, Admissions Policies Favor Whites*, L.A. TIMES, July 15, 1997, at A3 (same); *Education in California: After Preferences*, ECONOMIST, July 19, 1997, at 27-28 (same); *cf.* Peter Applebome, *Affirmative Action Ban Changes a Law School*, N.Y. TIMES, July 2, 1997, at A14 (reporting that one black will be in Berkeley law school 1997 entering class).

ballot initiative process to amend the State Constitution to prohibit State courts from ordering busing or mandatory pupil assignment as a remedy for de facto public school segregation in the now-famous *Crawford* case.[538] In so doing, the California voters overruled the California Supreme Court, which had interpreted the State Constitution to require the remedies that the *Crawford* amendment prohibited.[539] The California voters also attempted unsuccessfully to repeal the state's fair housing statutes,[540] and successfully adopted a statewide exclusionary zoning measure.[541] Considered in the aggregate, these measures demonstrate that the California political system has a history of hostility to racial minorities so pronounced that it further undermines the claim that Proposition 209 was motivated by a desire for neutrality.

All of these factors suggest that Proposition 209 was motivated by an intent to discriminate against women and minorities in the allocation of societal power and resources, rather than by a benign intent to promote equality in the allocation of societal benefits. This inference is further strengthened by the fact that whites will soon cease to be a majority in the state of California. Demographers predict that early in the next century, whites will constitute a minority in California, with a majority of the State's residents having roots that are traceable to Africa, Asia, Latin America, the Middle East or the Pacific Islands.[542] A time-honored political maneuver is the use of struc-

538. *See* Crawford v. Board of Educ., 458 U.S. 527, 531-32 (1982); s*ee also supra* notes 271-75 and accompanying text (discussing *Crawford*).

539. *See id*. (upholding anti-busing amendment to California Constitution).

540. *See* Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (invalidating Proposition 14, which amended California Constitution to prohibit enactment of fair housing legislation).

541. *See* James v. Valtierra, 402 U.S. 137, 143 (1971) (upholding California statute requiring local referendum approval to fund public housing projects).

542. *See* Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 138 (1995); *see also, e.g.*, Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990's and Beyond*, 8 LA RAZA L.J. 1, 2 (1995) ("Census projections indicate that by 2020, Whites will constitute 34% of the state's population; Latinos, 36%; Asian Americans, 20%; African Americans, 8%; and Native Americans, 1%."); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2060 n.220 (1991) (noting that whites will soon cease to constitute majority in California); Deborah Ramirez, *Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 961 (1995) (recognizing that whites could be minority in California by year 2000); Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1060 (1995) ("By the year 2050, people of color will make up approximately one-half of the United States' population . . . ." (citing William P. O'Hare, *America's Minorities—The Demographics of Diversity*, POPULATION BULL., Dec. 1992, at 2)).

tural changes to stave off an impending loss of direct political power. The facts surrounding *Marbury v. Madison*[543] indicate that after the election of 1800, the lame-duck Federalists tried to retain political power through the "midnight" appointment of life-tenured federal judges in the wake of their defeat at the polls by the new Republican majority.[544] It is reasonable to assume that the political majority in California is similarly apprehensive about its impending loss of political power to racial minorities, now that minorities threaten to supplant whites as the political majority in the state. Proposition 209 and the other xenophobic political measures that have been adopted in California can be best understood as efforts to entrench existing political power through the addition of constitutional amendments and other structural reforms that will make redistributive efforts difficult after whites lose their majority status to racial minorities.

The history of South Africa reveals that a white minority can use the legal system to control social, economic and political power even in the face of a large non-white racial majority, as long as the racial majority is given only truncated political rights.[545] South Africa has now ended its regime of formal apartheid, and has drafted interim and permanent Constitutions that guarantee equality and insist on the protection of minority rights.[546] At least as a nominal matter, the South African Constitutions explicitly permit the very type of affirmative action that Proposition 209 prohibits.[547] It is more than a little ironic that the dominant political powers in South Africa, who flourished under a regime of legally protected inequality, have now

543. 5 U.S. (1 Cranch) 137 (1803).

544. *See* STONE ET AL., *supra* note 128, at 31-32 (discussing factual background of *Marbury* decision).

545. *See generally* STEVEN DEBROEY, SOUTH AFRICA UNDER THE CURSE OF APARTHEID 187-220 (1990) (discussing state-sponsored racial oppression in South Africa during apartheid); MICHAEL LOBBAN, WHITE MAN'S JUSTICE: SOUTH AFRICAN POLITICAL TRIALS IN THE BLACK CONSCIOUSNESS ERA (1996) (same); LEONARD MONTEATH THOMPSON, A HISTORY OF SOUTH AFRICA (1990) (same).

546. *See* Christopher A. Ford, *Symposium on Affirmative Action: Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 1961-63 (1996); Adrien Katherine Wing & Eunice P. De Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS. J. 57, 75 (1995); *cf.* Sidney Kentridge, *Civil Rights in Southern Africa: The Prospect for the Future*, 47 MD. L. REV. 271, 279 (1987) (discussing prospects for bill of rights in proposed South African Constitution).

547. *See, e.g.*, Ford, *supra* note 546, at 1966-69 (discussing affirmative action provision of permanent South African Constitution); Wing & De Carvalho, *supra* note 546, at 78-79 (same).

embraced constitutional guarantees of equality and neutrality.[548] But it is also understandable. As the white South African power structure was threatened with a loss of political dominance, it realized that it could rely on the constitutional safeguard of "equality" to perpetuate its economic and social advantage. Similarly, the existing power structure in California, now likewise threatened with an impending loss of political dominance, has realized that it too can rely on the constitutional safeguard of "equality" to perpetuate its economic and social advantages. Such a motive may be cunning, but it is far from neutral. It entails the precise type of intentional discrimination that triggers heightened scrutiny under *Washington v. Davis.*

3. *Heightened Scrutiny*. Once the Proposition 209 prohibition on affirmative action preferences is subjected to heightened scrutiny under *Washington v. Davis*, its unconstitutionality becomes apparent.[549] To the extent that Proposition 209 prohibits race-based affirmative action, it constitutes a racial classification that is subject to strict scrutiny under *Korematsu* and *Adarand*.[550] A racial classification can be upheld under strict scrutiny only if it advances a compelling government interest and is narrowly tailored to the advancement of that interest.[551] To the extent that Proposition 209 prohibits gender-based affirmative action, it is a gender classification that is subject to rigorous intermediate scrutiny under the Supreme Court's recent decision in *The VMI Case*.[552] A gender classification can be upheld under intermediate scrutiny only if it serves an important government interest and is substantially related to the advancement of that interest.[553] Gender classifications rarely survive

548. *See* Kentridge, *supra* note 546, at 281 (pointing out irony, and black suspicion, of white minority support for bill of rights in South African Constitution).

549. *Cf.* Amar & Caminker, *supra* note 24, at 1023-24, 1034-35 (arguing that Proposition 209 would likely survive constitutional scrutiny under *Washington v. Davis* because it would not be viewed as intentionally discriminatory, but is nevertheless unconstitutional under the Supreme Court's political restructuring precedents).

550. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (prescribing strict scrutiny for racial classifications); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 235 (1995) (extending strict scrutiny to racial affirmative action programs).

551. *See Adarand*, 515 U.S. at 227.

552. *See* 116 S. Ct. 2264, 2275 (1996) (requiring "exceedingly persuasive" justification for gender classifications).

553. *See id.*

intermediate scrutiny,[554] and no racial classification has survived strict scrutiny since *Korematsu*.[555]

It is difficult to see how the Proposition 209 preference prohibition could survive either strict or intermediate equal protection scrutiny. The only legitimate government interest that proponents of Proposition 209 claim it advances is the promotion of equality through race and gender neutrality.[556] But, as the previous discussion has demonstrated,[557] Proposition 209 does more to advance intentional race and gender discrimination than it does to advance neutrality. In *Coalition for Economic Equity*, the district court easily found that Proposition 209 failed to satisfy even the less-demanding test of intermediate scrutiny that is applied to gender classifications, precisely because it promoted discrimination rather than ameliorated it.[558] With respect to the State's interest in promoting neutrality, the district court termed Proposition 209 a "nonsequitur."[559] The court of appeals never subjected Proposition 209 to heightened scrutiny, because it deemed Proposition 209 to be neutral and therefore not subject to heightened scrutiny.[560]

554. *See id.* (discussing difficult burden that state must meet to satisfy intermediate scrutiny).

555. *See* STONE ET AL., *supra* note 128, at 601 (noting that since *Korematsu* the Supreme Court has not upheld a "race-specific statute disadvantaging a racial minority"). *But cf. Adarand*, 515 U.S. at 237 ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))); Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194-95 (1997) (upholding voter redistricting plan that considered race as factor, although plan omitted majority-minority district at issue and seems to have been subject to only rational-basis scrutiny because race was not "predominant" factor under *Miller v. Johnson*, 515 U.S. 900, 920 (1995)). Although the government often uses explicit racial classifications, for one reason or another, the use of such classifications is often not subjected to explicit strict scrutiny under the Equal Protection Clause. *See supra* notes 403-12 and accompanying text (discussing government use of racial classifications).

556. *See supra* Part I.C.1 (discussing claimed moral justifications for Proposition 209). In the district court, Proposition 209 proponents also made the derivative argument that the state had an interest in avoiding liability for race and gender discrimination under the Fourteenth Amendment. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1509 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

557. *See supra* Part III.B.1 (discussing why Proposition 209 constitutes a race and gender classification).

558. *See Coalition for Econ. Equity*, 946 F. Supp. at 1508-09.

559. *Id.* at 1509.

560. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 701 (9th Cir.) (deeming Proposition 209 neutral for "conventional" equal protection purposes), *cert. denied*, 118 S. Ct. 397 (1997); *id.* at 707 (deeming Proposition 209 neutral for "political structure" equal protection purposes).

Once the discriminatory nature of Proposition 209 is understood, it is unlikely that Proposition 209 could withstand even the normally deferential, rational-basis standard of judicial review that the Court applies to non-suspect governmental classifications.[561] Proposition 209 prohibits women and racial minorities from protecting their interests through the adoption of political measures that are designed to advance those interests. In so doing, Proposition 209 preserves the social, economic and political advantages that white males initially secured through the enactment of discriminatory laws and standards, and now retain through the enactment of facially neutral laws and standards that prevent redistribution by their correlation with white male-ness.[562] This historic and present preference for the interests of white males over the interests of women and minorities is invidious. It subsists on the belief that there is something about white males that makes them more worthy than women or minorities, thereby making it appropriate to benefit white males by sacrificing the interests of women and minorities. This privileging of the interests of one group, and concomitant discounting of the interests of another, is squarely prohibited by the Supreme Court's recent decision in *Romer v. Evans*.[563]

In *Romer*, the Court invalidated "Amendment 2" to the Colorado Constitution on equal protection grounds.[564] Amendment 2 did two things. First, it repealed several local human rights ordinances that prohibited discrimination against individuals based on their sexual orientation.[565] Second, it prohibited future legislative, executive or judicial actions at any level of state or local government that were designed to protect gay men, lesbians or bisexuals from discrimination based upon their sexual preferences.[566] Like Proposition 209, Amendment 2 prohibited "quota preferences" in favor of the subject classes.[567] In fact, the Amendment was entitled "No Protected Status

561. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (applying rational-basis scrutiny to non-suspect classifications in order to defer to policy decisions made by representative branches); *see also* STONE ET AL., *supra* note 128, at 567-77 (discussing and questioning judicial competence to override means/ends determinations made by representative branches).

562. *See supra* Part III.B.1 (discussing ways in which Proposition 209 preserves advantages that white males have over women and racial minorities).

563. 116 S. Ct. 1620 (1996).

564. *See id.* at 1622.

565. *See id.* at 1623.

566. *See id*.

567. *Id.*

Based on Homosexual, Lesbian, or Bisexual Orientation."[568] The Colorado Supreme Court invalidated Amendment 2 under strict equal protection scrutiny, holding that invalidation was required by the Supreme Court's political restructuring precedents.[569] However, in Justice Kennedy's majority opinion, the United States Supreme Court emphasized that it was affirming the Colorado Supreme Court judgment "on a rationale different from that adopted by the State Supreme Court."[570]

Ascertaining the Supreme Court's different rationale for invalidating Amendment 2 is a challenging task.[571] The difficulty is created by the fact that the United States Supreme Court was unwilling to treat sexual preference as a suspect classification entitled to heightened scrutiny under the Equal Protection Clause.[572] If classifications based on sexual preferences were held to be suspect, the Supreme Court could easily have subjected Amendment 2 to heightened scrutiny and invalidated it as the Court almost always invalidates governmental classifications under heightened scrutiny. However, by holding that sexual preference was a suspect classification, the Court would have jeopardized the constitutionality of recent measures that the Court was apparently unwilling to invalidate. For example, if sexual preference were treated as a suspect classification, it would be difficult for the Court to uphold the Federal Defense of Marriage Act[573] effort to deny spousal benefits to members of gay and lesbian married couples,[574] or to uphold the "Don't Ask/Don't Tell" policy

568. *See* COLO. CONST. art. II, § 30b. Unlike Proposition 209, Amendment 2 did not include a discrimination prohibition. However, Justice Scalia's dissent argued that Amendment 2 did nothing more than prohibit governmental preferences for individuals with nontraditional sexual preferences, because special protections against discrimination based on sexual preference would in fact constitute a governmental preference. *See Romer*, 116 S. Ct. at 1629-31 (Scalia, J., dissenting).

569. *See* Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993). For a discussion of the Supreme Court's political restructuring precedents see *supra* notes 264-75 and accompanying text.

570. *See Romer*, 116 S. Ct. at 1624.

571. Commentators have pointed out the difficulties entailed in ascertaining the meaning of the Court's opinion in *Romer*. *See, e.g.*, Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 84-87 (1996) (noting doctrinal difficulties in *Romer* opinion); Seidman, *supra* note 491, at 73 (same); Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 6, 9 (1996) (same).

572. *See Romer*, 116 S. Ct. at 1627 (applying rational basis scrutiny to Amendment 2).

573. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419.

574. *See generally* Mark Strasser, Loving *the* Romer *Out for* Baehr*: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 301-04 (1997) (arguing that the Federal Defense of Marriage Act is unconstitutional on several grounds); Leonard G. Brown III, Comment, *Constitutionally Defending Marriage: The Defense of Marriage Act,* Romer v. Evans

designed to deal with the controversy over excluding gay men, lesbians and bisexuals from service in the military.[575]

The Supreme Court's unwillingness to treat sexual preference as a suspect classification left the Court struggling for a way to invalidate Amendment 2, which six justices found too objectionable to uphold. It was not easy for the Court to invalidate Amendment 2 under the deferential, rational-basis scrutiny that the Court applies to nonsuspect classifications, because rational-basis scrutiny rarely results in the invalidation of governmental classifications.[576] As a result, the Court had to come up with a way of explaining why Amendment 2 was so unusual that it could not withstand even minimal equal protection scrutiny. What the Court said was that Amendment 2 "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."[577] The Court added that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[578]

The *Romer* Court explicitly rejected the State's argument that Amendment 2 was constitutionally justified because it did no more than place people with nontraditional sexual preferences in the same position as all other people by denying them special rights.[579] The Court also rejected the claim that Amendment 2 was justified by the State's interest in deferring to the associational preferences of private individuals such as employers and landlords who had personal or religious objections to nontraditional sexual behavior.[580] The Court

and the Cultural Battle They Represent, 19 CAMPBELL L. REV. 159, 173-86 (1996) (arguing for the constitutionality of the Act); Diane M. Guillerman, Comment, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 464-71 (1997) (questioning constitutionality of the Act).

575. *See generally* Kay Kavanagh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, 1 PSYCHOL. PUB. POL. & L. 142 (1995) (discussing "Don't Ask/Don't Tell" policy); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375 (1995) (same).

576. *See* STONE ET AL., *supra* note 128, at 561-70 (discussing deference accorded under rational-basis review due to lack of judicial competence to override means/ends determinations made by representative branches).

577. *Romer*, 116 S. Ct. at 1627.

578. *Id.* at 1628 (ellipsis in original) (alteration omitted) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

579. *See id.* at 1624.

580. *See id.* at 1629. Although the Court stated that Amendment 2 was "far removed from" this deference-to-private-preference justification, *see id.*, Amendment 2, in fact, seems directly

concluded that the State had departed from a constitutionally mandated level of neutrality because it left an array of antidiscrimination measures in place, and invalidated only those antidiscrimination measures that protected individuals with nontraditional sexual preferences.[581] The Court viewed the Amendment 2 departure from this baseline of antidiscrimination measures as further evidence of discriminatory animus.[582]

Romer is not a doctrinally satisfying decision. As Justice Scalia's dissent was quick to point out, states are permitted to disfavor at least some forms of behavior on the grounds that the behavior is morally objectionable.[583] For example, moral disapproval permits states to prohibit murder, cruelty to animals and polygamy, and it is not clear why moral disapproval of nontraditional sexual preferences should be treated any differently.[584] Justice Scalia also emphasized that the *Romer* majority had not even mentioned—let alone overruled—*Bowers v. Hardwick*,[585] a case in which the Supreme Court upheld the constitutionality of a Georgia statute that the Court read as prohibiting homosexual sodomy.[586] If a state was free to punish nontraditional sexual behavior with criminal sanctions, the state should also be free to take the less draconian step of disfavoring such behavior by repealing the antidiscrimination provisions that protected it.[587] Justice Scalia also questioned the majority's conclusion that Amendment 2 evidenced voter animus toward individuals with nontraditional sexual preferences, pointing out that Colorado was one of the first states to repeal its sodomy laws.[588] Although Colorado voters disapproved of nontraditional sexual *behavior*, that did not mean that the voters bore animus toward the *people* who engaged in such behavior.[589]

responsive to this justification because it prohibits the government from coercing private parties into relinquishing their discriminatory preferences. The Court must therefore mean that the government cannot legitimately endorse private discriminatory preferences that are as invidious as the discriminatory preferences it deems to be protected by Amendment 2.

581. *See id*. at 1624-26.

582. *See id*. at 1628-29.

583. *See id*. at 1633 (Scalia, J., dissenting).

584. *See id*. at 1635-36 (Scalia, J., dissenting).

585. 478 U.S. 186 (1986).

586. *See id*. at 196.

587. *See Romer*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting).

588. *See id*. at 1633 (Scalia, J., dissenting).

589. *See id*. (Scalia, J., dissenting).

Romer seems to stand for the proposition that a governmental entity cannot invidiously impose burdens on an identifiable group simply because it dislikes the members of that group due to some immutable group characteristic.[590] Ironically, the arguments made by Justice Scalia in dissent tend to support this reading of the case. By illustrating the difficulty in finding any other doctrinal distinction between Amendment 2 and other moral prohibitions that the majority is willing to uphold, Justice Scalia's reasoning suggests that only invidious dislike can account for the majority's result. Although Justice Scalia questions the animus of Colorado voters, it is noteworthy that he does not dispute the general proposition that governmental animus is impermissible. He concedes that, "[o]f course it is our moral heritage that one should not hate any human being or class of human beings."[591] However, Justice Scalia distinguishes between disapproval of human beings and disapproval of the conduct in which human beings may sometimes engage.[592] *Romer* can therefore be read to permit governmental imposition of burdens designed to deter conduct that the state finds to be morally objectionable—including murder, cruelty to animals and nontraditional sexual conduct—but not to permit governmental imposition of burdens based on an immutable status of which the government disapproves. *Romer* permits the government to burden conduct that is susceptible to being deterred, but does not permit the government to burden an immutable status that is not susceptible to deterrence. Indeed, commentators have argued that *Romer* stands for the proposition that the government is not permitted to treat any group as a pariah,[593] or as the target of a bill of attainder,[594] and even that the implications of the *Romer* holding are vast

590. This reading of *Romer* rests on the view that nontraditional sexual preferences are innate rather than voluntarily adopted—a view that is controversial. *See, e.g.*, Roderick M. Hills, Jr., *Is Amendment 2 Really A Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 242-46 (1996) (discussing debate concerning innate nature of sexual preference).

591. *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

592. *See id.* at 1632-33 (Scalia, J., dissenting). Note, however, that Justice Scalia also states that the government can treat nontraditional sexual preference as a surrogate for nontraditional sexual conduct. *See id.* at 1632 (Scalia, J., dissenting). The distinction between status and conduct has been the subject of much legal scholarship. *See, e.g.*, Larry Catá Backer, *Reading Entrails:* Romer, VMI *and the Art of Divining Equal Protection*, 32 TULSA L.J. 361, 385 n.181 (1997) (citing sources discussing the "status/conduct divide").

593. *See* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 258 (1996).

enough to revive a Warren Court tradition of redistributive judicial activism designed to advance egalitarian moral objectives.[595]

Romer seems to preclude a finding that Proposition 209 can satisfy even rational-basis scrutiny, because Proposition 209 entails the same type of invidious discounting of group interests based on immutable characteristics that Amendment 2 entailed. As in *Romer*, Proposition 209 "seems inexplicable by anything but animus toward the class that it affects,"[596] and as in *Romer*, the Equal Protection Clause "must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[597] Like *Romer*, Proposition 209 cannot be justified as an effort to place women and minorities in the same position as all other people by denying them special rights,[598] and it cannot be justified by the state's interest in deferring to the associational preferences of that portion of the electorate that had personal objections to affirmative action.[599] Just as in *Romer*, Proposition 209 departed from a constitutionally mandated level of neutrality by leaving an array of other affirmative action preferences in place.[600] And, as in *Romer*, the Proposition 209 departure from this baseline of preferences constituted further evidence of discriminatory animus.[601]

The only reason that the California electorate could have had for favoring the interests of white males over the interests of women and minorities is that the electorate invidiously discounted the interests of women and minorities. An abstract interest in race and gender equality cannot adequately account for the adoption of Proposition 209, because the Proposition 209 preference prohibition preserves race and gender *inequality* rather than promoting equality in the allo-

594. *See* Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203, 203-04, 221-28 (1996). *But see* Hills, *supra* note 590, at 236 (arguing that Amendment 2 is not a bill of attainder, but is nevertheless invalid because of its breadth).

595. *See* Seidman, *supra* note 491, at 67-73, 96-98.

596. *Romer*, 116 S. Ct. at 1627.

597. *Id*. at 1628 (ellipsis in original) (quoting Department of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

598. *Cf. id.* at 1624 (rejecting as "implausible" Colorado's argument that Amendment 2 merely puts gays and lesbians in the same position as other persons).

599. *Cf. id.* at 1629 (refusing to credit Colorado's alleged interest in respecting the associational rights of those people who have personal objections to homosexuality).

600. *Cf. id*. at 1624-28 (concluding that Amendment 2, as a law which subjects only homosexuals and no others to a detrimental change in legal status, is a denial of equal protection).

601. *Cf. id.* at 1628 (observing that the disadvantage Amendment 2 imposes upon homosexuals raises "the inevitable inference" that the disadvantage is rooted in animosity towards homosexuals).

cation of societal resources. And Proposition 209 cannot be explained by an interest in ensuring that resources are allocated on the basis of merit, because Proposition 209 leaves in place *all* other affirmative action preferences that can supplant traditional measures of merit, including veterans preferences, athletic preferences, preferences for disabled individuals, geographic preferences, age preferences, preferences for individuals with learning disabilities, artist preferences, low-income preferences, preferences for alumni children, and the like.[602] Moreover, the very suggestion that women and minorities possess less merit than the white males who currently control the bulk of societal resources smacks of invidious prejudice. If it were true that women and minorities possessed less merit than white males, that would be an indication that the society was structured in a way that discriminated either in the manner in which merit was assessed, or in the manner in which training and educational opportunities for acquiring merit were allocated. The only other explanation for discrepancies in the allocation of merit—the explanation that the California electorate apparently accepted—is that women and minorities are inherently less "meritorious" than white males.[603] And that is a view that certainly entails the type of discriminatory animus that *Romer* declares to be constitutionally impermissible.

CONCLUSION

Like most propositions, California's Proposition 209 attempts to be seductive. It promises that by eliminating our race and gender affirmative action programs we can solve the problems of race and gender discrimination that have tainted our culture since the Nation was founded. Although women and minorities have traditionally been viewed as the victims of discrimination, Proposition 209 asserts that under a liberated understanding of contemporary culture, women and minorities are actually the perpetrators of discrimination. White males have become the forgotten victims. For proponents of Proposition 209, the antidiscrimination requirements that *Brown* and the Civil Rights laws of the 1960s instituted are adequate to eliminate any lingering problems of discrimination against women and minori-

602. *See* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1498 n.19, 1499, 1505 (N.D. Cal. 1996) (enumerating types of affirmative action preferences that are untouched by Proposition 209), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

603. *Cf.* Spann, *supra* note 194, at 90-94 (suggesting that opposition to affirmative action rests on belief that minorities are inherently inferior).

ties that persist in our present culture. But the reverse discrimination caused by affirmative action has slipped through the cracks of our antidiscrimination laws. As a result, we now need a distinct prohibition on race and gender preferences to preserve the type of equality that the framers envisioned. Because the United States Constitution can no longer be trusted to preserve that conception of equality, we must rely on Proposition 209 to prohibit the affirmative action preferences that the Constitution allows.

That is quite a Proposition. And although it seems transparently self-interested to me, the question of whether the culture at large should be seduced by this Proposition is a question that is inherently political. In a democracy, social policy should be made through the political process. However, the history of the Supreme Court in dealing with the formulation of race and gender policy suggests that the Supreme Court will be reluctant to relinquish control over the social policy issues raised by Proposition 209. That reluctance is unfortunate, because the social desirability of Proposition 209 seems to constitute a quintessentially "political question." The Equal Protection Clause is doctrinally too indeterminate to permit the Court to ascertain the validity of Proposition 209 without ultimately substituting its own policymaking preferences for the preferences of the electorate that adopted it. The magnitude of this doctrinal indeterminacy is illustrated by the striking divergence that exists between the rulings of the district court and the court of appeals on the constitutionality of Proposition 209. It is also illustrated by the difficulties that one encounters in attempting to conduct one's own analysis of how the Supreme Court's "conventional" and "political structure" precedents should apply to the constitutional questions raised by Proposition 209.

Notwithstanding the absence of doctrinal constraint to guide the exercise of judicial discretion, the Supreme Court has already intervened in the formulation of affirmative action policy. It has applied heightened equal protection scrutiny to invalidate affirmative action programs adopted through the political process that fail to comply with norms that the Court has found in the Constitution. Therefore, unless the Court is willing to overrule those decisions and to withdraw from the political debate about affirmative action, consistency requires the Court to apply that same heightened scrutiny to the Proposition 209 prohibition on affirmative action, and to invalidate Proposition 209 under the same constitutional norms that it has used to invalidate affirmative action programs.

Although the lower courts focused on a political structure analysis of Proposition 209, intuitively more satisfying analyses of Proposition 209 are available. The Court can subject Proposition 209 to heightened scrutiny as an affirmative action program for white males that redistributes resources on the basis of race and gender, just as it subjects other affirmative action programs to heightened scrutiny on that ground. Or it can subject Proposition 209 to heightened scrutiny under the intentional discrimination standard of *Washington v. Davis*. A number of factors strongly suggest that the voters of California utilized the purported facial neutrality of Proposition 209 in a surreptitious manner to take resources away from women and minorities and redistribute them to the white males on whose political support Proposition 209 was based. The race and gender animus inherent in Proposition 209's discriminatory reallocation of resources not only precludes Proposition 209 from surviving heightened scrutiny, but under *Romer v. Evans*, it precludes Proposition 209 from surviving the more deferential standard of rational-basis scrutiny as well.

A major premise of this Article has been that the Supreme Court should be consistent in the way that it treats affirmative action and prohibitions on affirmative action. If the Court were to read the Equal Protection Clause selectively to prohibit women and minorities from redistributing resources through the adoption of affirmative action programs, while permitting whites and males to redistribute resources through the adoption of Proposition 209, the Court would be engaged in a form of race and gender discrimination that is antithetical to the countermajoritarian function that the Supreme Court is typically said to serve. Nevertheless, the suggestion that the Supreme Court can operate in a countermajoritarian manner that is immune from the discriminatory inclinations of the overall political culture is a claim that is difficult to maintain. The Supreme Court itself is part of the political culture, and as such can stray only so far from popular political preferences. Accordingly, the Supreme Court's resolution of the Proposition 209 issue will be important not so much for its immediate disposition of that issue, but for its less-immediate revelation about how far our culture has progressed.

In the past, race and gender discrimination in the allocation of resources was unabashedly rampant. In the future, such discrimination will hopefully become an embarrassing relic of the past. What Proposition 209 does is present the Supreme Court with one of its periodic opportunities to give us cultural feedback about how far we

have traveled along our developmental continuum. Proposition 209 seeks to do to women and minorities what those who use propositions always seek to do to those at whom their propositions are directed. It would be nice to think that principled argument could prompt the Supreme Court to respond to this effort in a way that would move us further along the continuum of social progress. But the most that we can realistically expect the Court to do is give us feedback about how far we have progressed to date. The Supreme Court is inescapably a part of our culture. And we can never successfully prevent ourselves from being who we are.

We are a culture in which the influence of race and gender is so relentless that the possibility of race and gender neutrality remains realistically out of reach. In such a culture, Proposition 209 is perhaps most significant for its demonstration of the contradiction inherent in trying to get beyond the problems of race and gender by pretending that race and gender no longer matter. If the Proposition 209 prohibition on race and gender preferences is genuinely desirable, the first thing that Proposition 209 should be used to invalidate is Proposition 209 itself.